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CONVEYANCING

A BRIEF

Used in connection with lectures at the University of Detroit by Lloyd L. Axford, Detroit Bar

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HISTORICAL INTRODUCTION

The subject of Conveyancing concerns the practical application of the law of real property in the transfer of estates or interests in land.

The transfer of an estate in land is effected in the United States:

1. By voluntary conveyances by one person to another.

2. By descent under the laws of succession existing in the various states of the Union.

3. By a devise contained in a last Will and Testament.

4. By operation of law.

We will consider only voluntary conveyances and a brief reference to their history and origin may aid you in your study of a rather technical subject.

Our conveyances, like our common law, are of English origin and grew out of the Feudal System and the Statutes Mortmain, or to be more exact, through ingenious evasions of the latter statute.

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The Feudal System was introduced into England shortly after the Norman Conquest. Under it all the lands of the Kingdom were held in military tenure under the King as the ultimate lord of the fee. The barons and other lords took an oath of fealty to the King and received an allotment of land under an obligation to return military service. The barons in turn made allotments of their land to their inferiors or vassals under similar obligations. These allotments were termed feuds or fees. When it became desirable or necessary to assemble the armed array of the kingdom, the King called upon his vassal, the baron, to perform his obligation; the baron made a like demand upon his inferior, and the inferior on those under him, if any. The result was an assembled power for defense or aggression. If any vassal failed to perform the condition of his oath or deserted his lord in battle, his feud or fee was forfeited to his overlord and again allotted by the lord to others.

In early days of Feudalism, men were skilled in the art of war rather than the art of writing, and the conveyance or transfer of the feuds or fees was accomplished by delivery of possession by the lord to the vassal in the presence of the peers and free holders of the locality, accompanied by an oral declaration of the boundaries of the land allotted and the conditions under which the vassal was to hold, which were assented to by him.

This public delivery of possession was termed Livery of Seizen. Later of Livery of Seizen in conveyances was accomplished by the delivery of some symbol which it was agreed should represent the land as a twig of a

tree or some other small article which was a part of the particular premises.

This oral statement, publicly made, coupled with Livery of Seizen, constituted a Feoffment, which was the original conveyance of land at common law.

Proof of the nature and terms of the grant, if it was afterwards questioned, was dependent upon oral testimony. Later on the terms of feoffments were frequently reduced to writing, which was sealed and delivered for the purpose of preserving the evidence of the grant. However, a deed was not essential to the validity of feoffment in England until the year 1845, though the statute of frauds required a memorandum in writing at an earlier date.

As stated, the armed array of the kingdom was dependent upon the feudal tenants performing their military tenure. Corporations, religious and temporal, came into existence and were permitted to hold lands, but it was the law of the kingdom that corporations aggregate could not commit treason, felony nor crime, nor suffer attainder, forfeiture nor outlawry. The corporate existence was perpetual. There was no way to enforce a breach of the conditions of a feudal tenure when the lands were held by a corporation and because of their perpetual existence the overlords were deprived of many emoluments incident to the Feudal System.

Whether from individual self-interest of the King to preserve the emoluments of the Feudal System or from public policy in preserving the armed array of the kingdom, statutes were enacted and modified from time to time prohibiting the holding of land by corporations and

declaring them forfeited to the overlord when so conveyed.

The original statute was termed the Statute Mortmain, meaning the statute against the dead hand.

To evade the penalty of forfeiture, uses and trusts which had existed under the civil or Roman law were introduced into England. Under this device the land was granted to one who contemporaneously agreed that another, designated as cestui que trustent, should have the rents and profits of the premises. Under this scheme the corporations as cestui que trustents did not acquire the legal title, but received all the benefits of the ownership of the land. Their ingenuity was met by the Statutes of Uses which declared in effect that the party entitled to the rents and profits of the land should be deemed sole and complete owner, that is, the cestui que trustent took the legal title as well as the rents and profits.

It may be observed that the strife between legislative power and corporate interest, now so prominent before the public, originated as early as the reign of Henry III, and Blackstone, in his Commentaries, states that the Saxons some sixty years previous to the conquest, imposed restrictions upon the corporate holding of lands.

The instrument employed to create the use was a deed or contract of bargain and sale by which the owners of the land bargained or agreed to sell and convey it to another for a consideration and by the terms of the same instrument, or a part of the instrument, the grantee agreed to stand seized of the land for the use

of the purchaser. As stated, the Statute of Uses executed the trust, and the purchaser became vested with the seller's title.

Livery of Seizen, the only publicity given the transfer of land, was not necessary in this class of conveyances. Some years later Parliament, to prevent secret transfer of land, declared that bargain and sales should not pass an estate in freehold unless made by indenture and enrolled in certain public offices.

This deed of bargain and sale is the precedent, which, modified and curtailed from time to time, resulted in the deeds of conveyance in common use in most of the United States.

Blackstone, in his consideration of the subject of conveyances, in addition to the conveyance of feoffment and bargain and sale, has classified some fourteen conveyances and most text writers have followed his example This refinement of classification in most instances relates to the particular interest, estate or tenure sought to be conveyed and is of little or no practical importance.

A deed is defined by Blackstone as

> "A writing sealed and delivered by the party."

Mr. Washburn states:

> "A deed is defined to be a writing containing a contract and delivered by the parties thereto."

In fixing these definitions in your mind it must be remembered that the deed thus defined is not limited to conveyances of land, but includes all formal written contracts required at common law to be under seal.

Bonds or mortgages were "writings sealed and delivered by the party" and were deeds within either definition, and in this state in a criminal prosecution for forgery where the information charged the forging of a deed a conviction was sustained where the proofs showed the forging of a chattel mortgage.

People vs. Watkins, 106 *Mich.,* 437.

The popular and common use of the term "deed" refers to a conveyance of land, other sealed contracts being referred to by their distinctive name, as bonds, mortgages, leases, assignments, discharges, etc.

The definitions given have been criticized and enlarged by text writers, but the question of whether or not an instrument constitutes a conveyance of land has, so far as my knowledge goes, never been determined by the application of any definition.

The form of a deed at common law was either an Indenture or Deed Poll. If the instrument contained obligations of both the grantor and the grantee, it was prepared in two parts upon the same sheet of parchment or paper and then cut apart in an indented or wavy line. The two parts were identified, when it became necessary by fitting them together. The two papers when fitted together made the complete deed, hence the term Indenture.

If the instrument contained the obligation of but one party, it consisted of but one part and was polled or cut even, which is the origin of the term Deed Poll.

The common form of deeds in use in Michigan at the present time are termed:

1. Warranty Deeds.
2. Special Warranty Deeds.
3. Quit Claim Deeds.

All of these retain in part at least the form of the old indenture and commence, "This Indenture, Made this Day, etc."

The printing of blank deeds or use of blank form of deeds containing the words "Warranty Deed" or "Special Warranty Deed," unless such deed be an absolute warranty, is made a statutory crime in Michigan.

§11368 Comp. Laws, Mich., 1897.
C. L. 1915 15086

Deeds made by those in a representative capacity, such as executors, guardians, sheriffs, commissioners, and other officers of the court, retain the form of the old Deed Poll, and usually commence, "Know All Men by These Presents, That I," and continue with a recital of the source of authority, and a grant of the land in question with covenants limited to the acts of the grantor.

The use of the Indenture with its means of mechanical identification may have been a device to aid the illiterate in identifying their papers in the same manner that the seal was used to enable them to identify signatures, though I know of no authority for this idea.

Deeds in modern use are ordinarily executed by the grantor only, but we occasionally meet with deeds drafted for the purpose of effecting a partition or exchange, signed by all of the parties, and most deeds contain the substance of the old common law forms, though very much curtailed.

In Michigan and many of the other states the Legislatures have provided what is termed a "Statutory Short Form of Deed." These forms contain in substance the date, names of the parties, description of the land, a recital of the consideration; the words "convey and warrant" or the word "quitclaim" are substituted for the remainder of the old common law form, and the statute provides that "the conveyance duly signed sealed and acknowledged" containing these words shall be construed to have the same effect as if the common law form had been followed. Their use has not been popular.

§9014 Compiled Laws, Mich., 1897.

CL. 1915 11749

Warranty Deeds and Quitclaim Deeds differ in form, in that the former contains covenants or agreements guaranteeing the condition of the grantor's title, while the quitclaim deed contains no covenants of any kind.

The legal effect of the two instruments and the rights of a purchaser under one or the other are decidedly different. The quitclaim deed under the rule which obtains in Michigan and most of the states, conveys only the estate which the grantor had at the date of delivery, and the purchaser under a quitclaim deed cannot claim the position of a bona fide purchaser for value under the recording laws.

On the other hand, a warranty deed not only conveys the present interest of the grantor but usually conveys any other title outstanding at the time of the grant, which the grantor afterwards acquires, and the purchaser in the absence of actual notice is a bona fide purchaser, and protected against any claims against the property which have not been placed of record in the

proper public office, and of which he had no actual notice.

The rule that a purchaser under a quit-claim deed cannot be a bona fide purchaser has been changed by statute as to deeds made after August 23rd, 1915.

Act 199, P. A., Mich., 1915

I believe that if the common law rule were followed to its origin it would be found that it applied to the old common law deed of release and that our so-called quit-claim deed in common use is technically a deed of bargain and sale and is not the quit-claim deed known to the common law.

The formality of livery of seizen has been abolished in all the states, and conveyances of land are required to be in writing. However, land may still pass without writing. For example, if an oral gift of land has been made and the donee takes possession of the land, and is permitted to remain in possession, claiming ownership for such a period of time that the statute of limitations bars the donor's action to recover possession, he will acquire an unassailable title, and the Court of Equity will usually enforce an oral agreement to sell land where possession has been taken and valuable improvements made by the purchaser.

While not strictly a part of the law of conveyancing, it is germane to note at this time, that though a deed may be termed a contract, the law of the place where the land is situated and not the law of the place where the deed is made, as in other contracts, govern the validity of conveyances as to their form, the capacity of the parties, their construction and interpretation and the validity of their provisions.

For example: If a deed were executed in the State of Massachusetts conveying land situated in that state and also conveying land in Michigan, to a trustee with a direction to apply the rents and profits to A for life, after his death to B for life, after his death to C for life and at C's death to convey the land to C's then living issue, the instrument would create a valid trust in the Massachusetts lands where the common law rule against perpetuities prevails, while the trust and the deed creating it as to the Michigan lands would be void under the Michigan statutes regulating the suspension of alienation.

While not strictly an exception to the rule stated, it must be observed that the Constitution of the United States provides:

> "That all treaties made or which shall be made, shall be the supreme law of the land and the judges in every state shall be bound thereby."

It follows that this provision overrules the laws of the various states. If the law of a particular state prohibited the holding of land by an alien and a treaty between the United States and alien's sovereign provided otherwise, the conveyance to the alien would be upheld.

In referring to the particular parts of a deed, we still use the designations which Blackstone applied 150 years since, and which he then stated "had been well considered and settled for successive ages."

While all the formal parts do not necessarily enter into every deed, their names and the order in which they usually appear are as follows:

1. The premises.
2. The habendum.

3. The tenendum.
4. The reddendum.
5. The conditions.
6. The covenants.
7. The conclusion.

Premises:

In this part we find:

(A) The date, if the instrument is in form of an Indenture. If in the form of a Deed Poll the date is in the conclusion.

(B) The parties, their residences, title or occupation and the explanatory recitals concerning the parties, or the source of their authority (the custom of stating the title and occupation of the parties is not observed, though if this custom had been preserved it would be a great aid when it is necessary to identify a party to an ancient deed).

(C) The statement of the consideration and the acknowledgment of its payment.

(D) The operative words of conveyances, viz: grant, bargain, sell, release, alien and confirm.

(E) Words of limitation, that is language indicating whether the estate conveyed is a fee or less than a fee.

(F) The description of the property conveyed.

Habendum:

In this part of the deed we find the limitations of the estate granted viz: Words determining whether the deed conveys an estate in fee simple or for life or years, though words of limitations are usually inserted in the premises in connection with operative words.

The Tenendum

Is now obsolete and originally stated the feudal tenure and the feudal lord to whom it should be rendered.

Reddendum:

In this part of the deed we find the reservations; formerly rents or menial service, now usually possession for a limited time.

Conditions:

In this part of the deed are sometimes inserted conditions upon the happenings or non-happenings of which the estate granted is enlarged or defeated. For example, land is conveyed by father to son, but upon condition that the son support the father during life, and if the son fails to perform his obligation the land reverts to the father and the deed is void.

Covenants:

In warranty deeds agreements are always inserted which usually consist in an undertaking on the part of the grantor that he is seized in fee, that the land is free from incumbrances, and that he will warrant and defend the title against all lawful claims.

Conclusion:

In this part of the deed we find a recital that the deed has been executed, the date of signing and sealing or a reference to the date in the premises.

This is followed by the signatures of the parties, their seals, if required, the signatures of the witnesses, if required, and usually an acknowledgment or proof of execution.

An acknowledgment or proof of execution was not a part of the common law deed, and in most of the states is not essential to the validity of modern deeds, though a deed, the execution of which is neither proved nor acknowledged is not usually entitled to record.

It would seem from the language of the statute authorizing the use of the statutory form of deeds taken literally that acknowledgments are essential to their validity.

§9014, Comp. Laws, Mich., 1897.

C. L. 1915—11749

DATE OF DEEDS.

The date was not essential to the validity of a deed at common law. The date would seem to be essential to the statutory short form.

A deed takes effect or becomes operative at the date of delivery by the grantor to the grantee, and is legally presumed to have been delivered at its date of execution.

If the instrument is required by law to be acknowledged, it is the rule in Michigan and some of the other states that if acknowledged at a date later than the stated date of execution, it is presumed to have been delivered at the date of its acknowledgment.

Blanchard vs. Taylor, 12 *Mich.,* 339.
Johnston vs. Moore, 28 *Mich.,* 3.

This is only a legal presumption and may be overcome by proof and circumstances.

Eaton vs. Trowbridge, 38 *Mich.,* 354.

The true date of delivery becomes important where title is derived through a quit-claim deed, because, as before stated, such a deed passes only the title the grantor had at the date of its delivery. It is also important in connection with the covenants against incumbrances, particularly in relation to taxes.

In closing sales of real estate many a wrangle will arise as to whether the seller or purchaser must pay an existing tax or whether or not a purchaser can recover the amount paid for a tax in an action for breach of the covenant against incumbrances.

The rule is that if a tax is a lien upon the land at the date of the delivery of a deed, the grantor is bound to pay it, while if not then a lien, the purchaser must bear the burden.

The leading Michigan cases are:

Eaton vs. Cheeborough, 82 *Mich.,* 214, which relates to general taxes, and

Lindsay vs. Eastwood, 72 *Mich.,* 336, which relates to special assessments.

A reading of these cases will give you the reasons for the rules and you will also observe that the time the tax becomes a lien upon the land is fixed by statutory law.

PARTIES TO DEEDS.

In every deed there must be a grantor and grantee. The grantor must have the same capacity as is required in an ordinary contract.

At common law a grantor could not convey to himself. For a modern decision where a deed from a man to himself and his wife was involved, read

Wright vs. Belknap, 21 *D. L. N.,* 1225.

A deed executed by an insane or incompetent person or procured by fraud or undue influence is either void or voidable and may be set aside.

In Michigan our courts first held such a deed void.

Rogers vs. Blackwell, 49 *Mich.,* 192.

Later a deed from an insane person was held voidable.

Wolcott vs. Insurance Co., 137 *Mich.,* 309.

The distinction between a void and a voidable deed is, that in the former no rights are acquired by the grantee, while in the latter, the grant passes title unless repudiated, and it may be said that the circumstances surrounding each particular case are important in determining which rule applies.

An infant's deed is voidable, and may be affirmed by express act or by acquiescence after attaining majority.

The majority of a married woman in Michigan so far as it relates to releasing her inchoate dower or any other interest in her husband's lands is reached at the age of eighteen years.

Act 187, P. A. of Mich., 1899.

In drafting deeds it is customary to designate the grantors as parties of the first part, and the grantees as parties of the second part, together with their resi-

dences, and often some recital connecting them with previous title or other explanatory matter is added.

These additions have no bearing upon the validity of the deed, but serve to identify the person. They are useful when it becomes necessary to identify the parties to an old deed. If the grantor is a married man, his wife usually joins in the execution of the deed, and her name is followed by a recital, "his wife."

If the grantor be an unmarried man, his name is usually followed by recital, "a single man" or a "widower."

Under the law now in force in Michigan a deed or mortgage, which does not state whether the male grantors are married or single, is not entitled to record.

Act 79, Pub. Act Mich., 1915.

It is customary in examining land titles to accept these recitals as true, but they are not conclusive and are of no effect if false. If a married man makes a deed reciting in the deed that he was single, it would not bar his wife's inchoate dower, though if the deed were a quit claim an action might lie upon the false misrepresentation. In such a case a purchaser under a warranty deed would have his remedy under the covenants.

Recitals are not evidence of the facts stated.

Wolf vs. Holton, 104 *Mich.,* 107.

They are ordinarily binding upon parties to the deed but not upon strangers, *but they are notice of the facts stated.*

Recitals in ancient documents, however, are evidence and binding upon strangers.

Norris vs. Hall, 124 *Mich.,* 170.

If the records of a land title show a grant to one person followed by a grant from a person of the same name, there is a legal presumption that the persons are identical.

Goodell vs. Hubbard, 32 *Mich.,* 47.

In drawing deeds it is desirable that you have an abstract of title before you and keep the spelling of the names uniform, that this presumption may be preserved beyond question, or if there has been a variance, insert a recital in the deed explaining the previous error.

This is not always necessary under the strict rules of law. Names which sound alike although spelled differently are presumed to be the same, that is, *idem sonans.*

People vs. Finnegan, 5 *Mich.,* 146.
Boyce vs. Danz, 29 *Mich.,* 146.
Kinney vs. Harrett, 46 *Mich.,* 87.
Brown vs. Quinland, 75 *Mich.,* 289.
Detroit vs. Macier, 117 *Mich.,* 76.

This presumption of identity does not follow where the Christian and family names are used followed by the family name and similar initials, that is, it will not be presumed that J. A. Blair and James A. Blair are the same person.

Bennett vs. Libhardt, 27 *Mich.,* 488.

Where a father and son bear the same name and

there is nothing to distinguish which is intended, the father is presumptively the grantee.

Dehn vs. Dehn, 170 *Mich.,* 407.

If, however, a person is known by two names, his deeds executed in either name will be valid on proof of the facts. A deed from William Hommell was held to be the deed of Wendelin Hommell.

Hommell vs. Devinney, 39 *Mich.,* 522.

A variance in the middle name or initials or an omission of a middle name or initials does not generally change the presumption of identity. The middle name is regarded as of no consequence.

Berkery vs. The Judge, 82 *Mich.,* 160-165.

The common law does not recognize middle names. In the earliest times given names alone were used to identify persons, with an added statement of their residence or occupation.

For example: John of Seybrook or John the son of John of Seybrook, or John, the miller of Seybrook, or John, the smith of Seybrook.

The residence or occupation thus attached was the derivation of surnames. John, the miller, became John Miller, etc.

Massachusetts, Maine, California and other states have abandoned the common rule law, and regard the middle name or initials as having an important bearing upon the question of identity.

At common law, if a person not named in a deed joined in its execution as one of the grantors, the weight

of authority was that his interest in the land, if any, did not pass as there was nothing in the deed to indicate an intention of conveying. Such was the rule in Michigan.

Newton vs. Mc Kay, 29 *Mich.,* 1.

This doctrine has been overruled in the recent case of

Agar vs. Streeter, 21 *D. L. N.,* 1227.

When a woman acquires land and subsequently marries, it is customary to describe her with her husband's surname followed with a recital of her former name, as "Mary Smith, formerly Mary Jones."

GRANTEES.

The grantee is not ordinarily required to have the same capacity as a grantor, and deeds to infants, insane persons and others who have no capacity to make a contract are generally valid.

As a general rule the grantee must be described with certainty, and be a person in being and capable of holding land. This rule is not very rigidly observed. The grantee need not be named in the premises. It is only necessary that it can be determined from the deed to whom it was intended to convey the land.

An illustration of a liberal construction of a grant will be found in

Newton vs. Mc Kay, 29 *Mich.,* 1.

For a deed held void because of uncertainty of the

Skinner vs. Grace Church, 54 *Mich.,* 543.

A deed in the alternative has been sustained as a deed "to a man or his heirs."

Ready vs. Kersley, 14 *Mich.,* 215.

A conveyance to the estate of a deceased person has been held void for uncertainty.

Summons vs. Spratt (*Fla.*), 1 *So.,* 860.
Mc Inerney vs. Beck, 10 *Wash.,* 515.

This error is not uncommon and if you will consider the literal meaning of the language you must conclude that it describes property and not a person.

The estate of a deceased person may be land, stock, bonds, chattels, or choses in action.

A deed to a person reciting that he is an administrator of the estate of another person vests the title in the person named and not in the heirs or creditors of the deceased person, and a conveyance by the party named passes the title.

Little vs. Lesia, 5 *Mich.,* 119.

Whether a deed to a person named, followed by the word "trustee," vests the title in the person or gives notice of a trust, is a mooted question. I believe the better rule is that the addition of the word "trustee" is merely descriptive of the person and it seems to me that this rule is sustained by the case of

Little vs. Lesia.

See also

Sanborn vs. Loud, 150 *Mich.,* 155.

One of the leading cases holding the contrary rule is

Union Pac. R. R. Co. vs. Durand, 95 *U. S.,* 576.

Where two or more grantees are named in a deed, unless there is something to the contrary expressed in the deed, they take as tenants in common in equal shares.

§8826 C. L. Mich., 1897.
C. L. Mich. 1915 — 11562

It may be expressly declared in a deed that the parties shall take in joint tenancy.

Supra.

At common law the rule was reversed and the grantees were presumed to be joint tenants, unless declared to be tenants in common.

There is one statutory exception to this rule.

Where a deed runs to a husband and wife whether named as such in the deed or not, if the marriage relation actually exists, they take as tenants by entirety.

§8827, C. L. Mich., 1897.
C. L. Mich 1915 — 11563

A devise of land to husband and wife creates the same estate.

Supra.

Where husband and wife purchase land under a contract they are also tenants by entireties.

Auditor General vs. Fisher, 84 *Mich.,* 128.
Schleiss vs. Thayer, 170 *Mich.,* 395.

Where husband and wife acquire lands under the laws of descent or succession the Courts have held they are tenants in common.

Brown vs. Barabro, Wis., 18 *L. R. A.,* 320.

Husband and wife are tenants by entirety though the grant passes an estate less than a fee.

Beamer vs. Vinton, 55 *Mich.,* 559.

Where a deed runs to several persons, two or more of whom are husband and wife, without specification of the particular shares, husband and wife usually count as one person and take one share, viz:

A deed to John Smith and Mary Smith, his wife, and James Jones, parties of the second part, would vest an undivided half of the premises in Smith and wife as tenants by entireties and the remaining undivided half in Jones.

Deeds to partnerships should name the partners individually as grantees.

Generally a deed to John Smith & Co. is held to vest the legal title in John Smith and not in the other partners constituting the company.

A deed to Jones and Brown vests the title in both.

A deed to a partnership under a trade name, as "The Bazaar," is void for uncertainty.

As our statutes now require a public record of the names of the individuals conducting a business venture under an assumed name, the rule may be changed if the question should again come before the courts.

Act 101, P. A. Mich., 1907.

It is a maxim that "That is certain which can be made certain."

When we speak of deeds being void for uncertainty or various defects, we mean no title to the land will vest under such a grant. Usually the real party in interest can protect his rights in a court of equity. An equitable title is not recognized in the law courts and cannot be introduced in defense or support of an action of ejectment.

DEEDS TO AND FROM CORPORATIONS.

From the time of the passage of the statute mortmain until a comparatively recent date the power of a corporation to hold lands has been limited to that necessary for the conduct of its principal business. In recent years the formation of corporations for the express purpose of holding and dealing in lands has been authorized in most of the states.

Ordinarily deeds to and from corporations run in the corporate name followed by a recital that the party is a corporation organized under the laws of a state named.

Where the words of limitation, that is, the words, "heirs and assigns," would appear in a deed between natural persons, the word "successors" is substituted for the word "heirs," but this addition is not essential to create an estate in fee in a corporation.

Corporate deeds are usually executed by the president and secretary and attested by the corporate seal.

However, the statute under which the corporation is organized often directs the manner in which grants of land shall be executed, and if silent the by-laws of the corporation usually cover the question.

It is necessary to examine the statutory law above referred to in each instance and if it happens to be an old corporate deed that is in question, the law in force at the time of its execution.

CONSIDERATION.

A study of decided cases on the question of the necessity of a consideration for a deed will result in many apparently conflicting statements.

It may be said generally that between the parties and their privies a deed is valid without a consideration. Such is the Michigan rule.

Gale vs. Gould, 40 *Mich.,* 515.

Where the rights of third parties are involved such as the creditors of a grantor, a deed without consideration will be set aside, and in such a case the consideration must ordinarily be a valuable consideration if the deed is to be sustained.

The recital of a consideration in a deed is not sufficient evidence when the validity of the grant is attacked by third persons.

Ripley vs. Seligman, 88 *Mich.,* 177.

The true consideration for a deed can always be shown by parol evidence.

This may appear to be a violation of the rule that a written contract cannot be varied by parol evidence, but technically, the statement of the consideration in a deed is not a part of the contract, it is not "an agreement to do or not to do a particular thing."

Deeds generally contain an acknowledgment of receipt of the consideration. This practice originated to prevent a trust resulting under the old common law rules.

Resulting trusts are now abolished by statute in Michigan.

§8835 Comp. Laws Mich., 1897.
C. L. Mich, 1915 — 11571

Most deeds, as drawn at the present time, recite as consideration, "The sum of one dollar and other valuable consideration," particularly in the City of Detroit.

A few years ago an act was passed by the legislature requiring that every deed of land left with the Wayne County Register's office for record be sent to the Assessor's office before being returned to the owner. The Assessor's interest seemed to have been to note the recited consideration in the deed upon the field book for the following year's assessment.

Immediately afterwards the practice of reciting $1.00 in deeds arose, and it prevails in some ninety per cent of the instruments recorded from day to day.

It is said that a law which does not have the support

of public opinion is rarely enforced. It is my observation that tax laws which are not burdensome are generally observed, while those which are confiscatory are evaded. Few, if any, find fault with the present mortgage tax law or federal income tax law. In each instance the amount demanded is within the means of the person affected.

OPERATIVE WORDS.

The operative words of a deed constitute that part of the premises which manifest an intention to grant or transfer something.

The words ordinarily used are:

Grant, bargain, sell, remise, release, alien and confirm.

These words are borrowed from the technical words of the old forms of deeds.

The operative words of the various forms were:

Feoffment—"Give, grant and enfeoff."

Grant—"Give and grant."

Lease—"Demise, grant and to farm let."

Exchange—"Exchange."

Release—"Remise, release and forever quitclaim."

Confirmation—"Give, grant, ratify, approve and confirm."

Surrender—"Surrender, grant and yield up."

Bargain and sale—"Bargain and sell 'or' give, grant, bargain and sell."

Covenant to stand seized—"Covenant to stand seized to the use of."

The practice of combining the operative words of the various kinds of deeds arose through precaution of the ancient conveyancers. Their idea was that if the instrument would not operate as one kind of a conveyance it would as another.

Our predecessors endeavored to make the law an exact science, while modern courts seem to attempt to do justice in individual cases.

The general rule in most of the states at the present time is that if the whole instrument shows an intent to pass title it will be so construed, if practicable, to have that effect.

Brewton vs. Watson, 67 *Ala.,* 121.
Johnson vs. Banlock, 38 *Ill.,* 611.
Negaunee Iron Co. vs. Iron Cliff Co., 134 *M.,* 264.
Sharp vs. Sharp, 148 *Mich.,* 278.

The word "grant" was held sufficient to create a feoffment, grant, gift, lease, release, confirmation or surrender in the time of Coke.

Coke Litt., 301 *b.*

It is and has been customary for time immemorial to insert words of limitation in the premises after the operative words, that is, deeds usually read grant, bargain, sell, etc., to the parties of the second part, *his heirs* and assigns.

The word "heirs" is a word of limitation and in effect means that an estate in fee has been conveyed.

Under the common law and I believe in all the states this rule prevails, except where modified by statute. At common law and in many of the states this rule was inflexible. No matter what words were used or how well the intention may have been expressed to create a fee simple, if the word "heirs" was not used in connection with the grant to the grantee somewhere in the deed, only a life estate passed.

In other states words equivalent to the word heirs have been held to pass a fee.

In Michigan since Sept. 10, 1881, a deed conveys all the estate the grantor has unless there is a contrary intention, reservation or limitation.

§9016 Comp. Laws, Mich., 1897.

C.L. Mich 1915 — 11751

DESCRIPTION.

The purpose of the description in a deed is to indicate what particular land the grantor intends to convey to the grantee and afford means for its identification.

In England and in the older states of this country there was no general survey and lands were generally described by reference to the name by which it was commonly known, as "The Manor of Dale," or a part of some particular tract or by courses and distances from a particular starting point identified by some well known physical land mark or by metes and bounds.

After the federal union was established in our country and the territorial limits of the original states were fixed, the remaining lands were considered the property

of the United States and known as the public domain and included all the lands north of the Ohio and west of the Mississippi Rivers not owned by individuals prior to the cession to the United States and some portions of Florida, Alabama, Mississippi and Tennessee.

The public domain was looked upon as a source of revenue and under the laws enacted by Congress was opened to private entry to cash purchasers, homestead entries and entries under military warrants, the latter being private grants or rewards for military service or financial aid rendered in the war for independence.

Some systematic method of describing the lands was necessary and the present system of surveying, which I believe was invented by Gen. Rufus Putnam, a Revolutionary officer, was introduced in 1785 or 1786.

This system established a series of arbitrary lines running north and south termed Principal Meridians, with accompanying east and west lines termed Base Lines. The former are fixed with reference to certain Meridians of Longitude established or located through and by astronomical observation and the latter established in the same manner with reference to Parallels of Latitude.

There are twenty-four Principal Meridians in this country, each having an accompanying Base Line. The meridian upon which the Michigan survey is based is known as the Michigan Meridian and is in longitude 84 degrees 19 minutes, 9 seconds west from Greenwich, running through the state near Lansing; the accompanying Base Line is the line between Wayne and Oakland Counties. The surveys in some of the states are

governed by more than one meridian. Lines were run parallel to the meridians and base lines six miles apart dividing the territory into townships. The townships are designated as north or south of the base lines and east or west of the meridian. As, for example, Town 6 North Range 6 East, means a township the southerly line of which is 30 miles north of the base line and whose westerly line is thirty miles east of the meridian. Towns were again divided into squares of one mile each by running similar lines which were called sections, and the sections again cut by lines running north and south and east and west dividing them into substantially equal quarters, known as Quarter Sections. The sections were numbered from one to thirty-six, always starting in the northeast corner of the town and numbering to the left until the town line was reached, dropping down to the next tier of sections and numbering to the east until the east town line was again reached and continuing the process until each section was numbered.

In the government survey, stakes or land marks were set at all town and section corners and at all the starting points of lines cutting the sections into quarters. The stakes at the township corner are termed "Town Corner"; those at the section corners termed "Section Corners." The stakes at the commencement and termination of the lines dividing the section into quarters are termed "Quarter Posts," the lines dividing the sections are termed "Quarter Lines." We speak of the west quarter post of a section meaning the stake set in the west line of the section midway between its northwest and southwest corner and refer to the other quarter posts by a similar designation, and the lines connecting the quarter posts as the north and south quarter lines and east and west quarter lines.

In the actual disposition of the land the quarter sections were again divided by two intersecting lines dividing them into four quarters. These lines are often termed "eighth lines." The quarters of the sections are referred to as N. E. ¼ or N. W. ¼, etc., with reference to their location in the section and the quarters of the original quarter sections in like manner as N. W. ¼ of S. W. ¼, etc.

No stakes were set in the original survey of the sections, except the four corners and four quarter posts.

The standard section corner is a post four feet long, four inches square, set two feet in the ground.

The standard quarter post is three feet long, three inches square, set one foot in the ground.

The field notes of the survey gave the course and distances from the section corners to adjacent land marks, usually trees in this locality, that the corner might be located if the post was destroyed.

Owing to the convergence of meridians the section lines are not exactly parallel and the sections are not all of equal area. This is all taken care of in the sections in the north and west tiers in each town and they will be found short in many instances.

Where the land surveyed bordered upon the Great Lakes and larger inland lakes these designations were usually abandoned in designating the adjacent land, and the land fronting upon the water designated as a "lot," as Lot 2, Section 34, T. 3. N. R. 14 E. These lots are often referred to as "Government Lots."

There is another series of posts and lines established by the original survey known as meander lines and meander posts. When the land bordered upon water, a line was often run substantially parallel with the water's edge, though not coincident with the water's edge, and posts were set at the angles in this line. These lines were not boundaries and were run for the purpose of determining the area of the land in the particular tract.

When the subdivisions of this government survey are divided into smaller parcels the boundaries are measured and their directions given with reference to the points of the magnetic compass, resulting in a description by "courses and distances."

The course of a boundary line is determined by measuring the angle made by the intersection of such line with a line running due north or south, the latter being found at any desired point with a compass.

To illustrate, suppose you placed a compass over the center line of Woodward Avenue and were looking toward Pontiac, the north end of the needle would point to the right or east of the line of Woodward Avenue. If you count the degrees upon the dial of the compass from the north point of the compass to a line coincident with Woodward Avenue, you would go west from the needle point 26° and the course of Woodward avenue if following it toward Pontiac would be described as North 26° West.

If you turn about face and repeat the operation the south point of the needle would be to the west of the line of Woodward and counting the degrees from it to

the line coincident with Woodward you would go to the east 26° and the course of the avenue going toward the river would be described as South 26° East.

An engineer surveying the block between Woodward, Elizabeth, Witherell and Adams Ave., starting at Woodward and Adams Aves., going toward Pontiac, would go north 26° W. to Elizabeth Street, turning a right angle toward the east; following Elizabeth Street his course would be N. 64° East; turning south down Witherell Sreet his course would be S. 26° E.; turning west along Adams Ave. his course would be S. 64° W.

There is still another subdivision of lands established by the government surveyors in this locality termed Private Claims. This term is used to distinguish the land from the public domain. The American government came into possession of the lands known as the Northwest Territory by cession from Virginia and other of the original colonies. The deed of cession from Virginia was conditioned that the rights of certain inhabitants in possession be recognized by the Federal Government. Acts of Congress were passed for the settlement and adjustment of the land titles. The government recognized the claim of title to land by those who had been in actual possession and made improvements during the French and English rule, and were in actual possession July 1, 1796, but required each claim to be proved before a tribunal, which in Michigan was known as the Land Board, consisting of the Register and Receiver of the Land Office and the Secretary of the Northwest Territory, and when so proved that the land be surveyed by the government surveyor and a plat of the survey returned to the land

office. The claim was then confirmed by a patent issued by the general government.

The patents of Private Claims are technically confirmations, not grants. They do not convey title. The United States never had title.

Langdean vs. Hanes, 21 *Wal.* (*U. S.*), 521.

The early French and English settlers occupied only lands fronting upon the rivers, lakes and streams, the water being the only highway, and they were in possession of narrow strips undoubtedly that their habitations might be close together to afford both society and protection against the Indians.

Under the land laws the claimants were permitted to hold the frontage on the water of which they had possession, with a depth of 40 arpents, but not to exceed 640 acres. Later another Act of Congress was passed permitting the claimant to extend back an additional forty arpents if their original holding did not exceed 640 acres. From these acts we derive the term front and rear concessions.

The rear line of these claims in the City of Detroit is Mc Graw Avenue on the west side and Harper Avenue on the east side.

Private Claims will be found in this vicinity upon the Great Lakes and connecting waters and upon most of the nearby rivers, as the Huron and Clinton, and about Mackinaw and the Soo.

The arpent was a French acre and as used in this locality was equal to about 192.24 feet. Remember

this distance, as you will find it necessary to convert this measure into English chains and feet from time to time. You will find an extended report concerning it made by Judge Woodward to the Washington authorities.

Vol. XIV., Am. St. Papers, p. 264.

The arpent was the Royal Paris Acre and it is interesting to note that the so-called English acre, being a little over 208.71 feet, is also a French measure, being the Norman acre, which was introduced into England after the Conquest.

We also have tracts of land locally known as the Governor and Judges' Plan, Park Lots, the Ten Thousand Acre Tract, the Military Reserve (Reservation), the Ship Yard Tract and the Arsenal Grounds.

Their descriptions are historical and are only of local interest.

The original City of Detroit was destroyed by fire in 1805. The old lines and land marks were obliterated. Congress authorized the Governor and Judges to lay out a new town and 10,000 acres additional and to grant every inhabitant a lot of 5,000 square feet in area in the town, using the 10,000 acres to supply deficiencies, and to sell the surplus and use the proceeds to construct a court house and a jail. Following this authority the Governor and Judges plan was laid out approximately between the river, Adams Avenue, Cass Avenue and Randolph Street. The land either side of Woodward between the Private Claims known as the Cass or Macomb Farm and the Brush or Askin Farm and the Boulevard was cut into lots and a rectangular tract containing some 9,000 odd acres laid out north of the Boulevard. The land along Woodward Avenue from

Adams Avenue to the Boulevard is termed "Park Lots," and the tract above the Boulevard the Ten Thousand Acre Tract, though the Park Lots are, strictly speaking, a part of the 10,000 acres authorized to be laid out under the legislation mentioned.

The Shipyard Tract lies on the River Rouge, the Military Reservation between Griswold Street, Cass Avenue, Michigan Avenue and the river, and the Arsenal Ground at Dearborn.

In actual conveyancing it will be well to always use descriptions that will trace back to the survey and always avoid local landmarks which are in no way connected with the survey. The latter may disappear and cannot be connected with the record or paper title to the land except through a survey.

There is a practice, more or less common, of describing land as a piece of land on a certain section or claim bounded north by the lands of one owner and upon the other sides by the lands of other owners. When it becomes necessary to examine the title to lands thus described, the title to the surrounding lands must also be examined in order to determine with any certainty the land included in the description. This has been quite correctly termed the "lazy man's description," and it may be added that it is no lazy man's task to follow it.

The general rule is that the description of the land in the conveyance must be certain and definite; that is, the language used must point out the means of identifying and distinguishing the particular land from all other lands.

Extrinsic evidence may be resorted to in applying the

description to the ground but not to vary or supply the description.

Rix vs. Smith, 145 *Mich.,* 203.

If from the language used, aided by local inquiries and other records, surveys or documents referred to in the deed, the land can be located it is sufficient.

Persinger vs. Jubb, 52 *Mich.,* 304.

By local inquiries we have reference to local physical landmarks, such as highways, water courses and other natural and artificial monuments, or to a tract of land generally known in a particular locality by some particular name.

By other records we mean plats, surveys and other conveyances or records referred to in the deed.

Uncertainty arises in several ways. In conveying a portion of a large tract, frequently there is no manifestation of what part of the tract is intended. For example: A part of out lot 2, L. Beaubien Farm, containing one acre, would be indefinite, while the north one acre of Lot 2, L. Beaubien Farm would be definite and would mean a rectangular piece off the north end of the lot having an area of one acre.

Descriptions by courses and distances are indefinite if the starting point is not fixed with certainty. If, however, the starting point is indefinite and later on in the description a monument is described, the description will be certain.

Taber vs. Shattuck, 55 *Mich.,* 371-373.

For instance, a description commencing at a stake in the east line of Woodward Avenue, run thence N. 26° W. 100 feet; thence N. 64° E. 200 ft.; thence S. 26° E. 100 ft.; thence S. 64° W. 200 ft. to beginning, would be indefinite. If the description reads in the same way and had the words "to the N. W. corner of Park Lot 57" inserted after the phrase N. 26° W. 100 ft., the description would be definite. The designated corner of the Park Lot could be taken as a starting point and the land located.

General descriptions have been held sufficient, as all the grantor's land in a certain town, county and state, or the descriptive name of a tract by which it is generally known, as "Schoolcraft Store property."

Francis vs. Barry, 69 *Mich.,* 31.

The failure to designate the state and county where lands are described as section, town and range is not fatal to a description where possession of the land intended to be conveyed was taken under it.

Russell vs. Sweezne, 22 *Mich.,* 235.
Marr vs. Benedict, 98 *Mich.,* 260.

A grant of all the land to which a person has any right, title or interest has been held sufficiently definite.

Austin vs. Dolb, 101 *Mich.,* 292, and cases cited.
Huron Land Co. vs. Robarge, 128 *Mich.,* 686.

CONSTRUCTION AND INTERPRETATION.

There are certain rules for the construction of deeds, viz:

1. The object of construing a deed is to ascertain the intention of the parties.

Monfort vs. Stevens, 68 *Mich.,* 61.

2. They are to be construed with reference to the facts which existed at the time of delivery.

Mc Connell vs. Rathbun, 46 *Mich.,* 303.
Hoffman vs. Port Huron, 102 *Mich.,* 437.

3. The acts of the parties immediately after execution showing their understanding are to be considered.

Monfort vs. Stevens, 68 *Mich.,* 61.

4. A deed must be so construed, if possible, that no part shall be rejected.

Jones vs. Pashby, 62 *Mich.,* 622.

5. When a general description is followed by a more particular description the latter expresses the intents and controls.

Nichols vs. Furniture Co., 100 *Mich.,* 230.

6. Lands, marks and monuments will control courses and distances.

Howell vs. Merrill, 30 *Mich.,* 382.
Diehl vs. Zanger, 39 *Mich.,* 601.

7. Permanent natural monuments control artificial monuments.

8. Where a general description is followed by a clause stating the intent of the parties as to the premises conveyed such clause will control the general description.

Flummer vs. Gould, 92 *Mich.,* 1.

9. The language of the deed is to be taken most strongly against the grantor.

Bolio vs. Marvin, 130 *Mich.,* 82.

These rules are only an aid to construction. They are not inflexible. The true intent of the parties gathered from the whole instrument, considered in connection with the facts existing at the time of its execution and delivery and the acts of the parties giving it a practical construction, will, if the intention thus determined be lawful, overcome all arbitrary rules.

Negaunee Iron Co. vs. Iron Cliffs Co., 134 *Mich.,* 264.

In seeking the intent of the parties Judge Cooley construed the word "to" when used in the phrase "running to the rear line of the claim," as running "toward" the rear line.

Moran vs. Legatte, 54 *Mich.,* 83.

What constitutes a boundary is usually a question of fact.

Jones vs. Pashby, 62 *Mich.,* 622.

Apparently opposed to some of the foregoing rules is the rule expressed by the maxim, *"Falsa demonstratio non nocet,"* i. e., "A false description does not vitiate when a description of the essential matter remains."

Tuthill vs. Kratz, 163 *Mich.,* 618.
Anderson vs. Boughman, 7 *Mich.,* 69.

Where a description refers to a map or plat, such map or plat is to be considered as much a part of the deed as if fully incorporated in the instrument.

Nichols vs. New England Furniture Co., 100 *Mich.,* 230.

A reference to another deed or contract has a like effect.

The fact that the plat is not acknowledged or has not been recorded will not defeat the grant, though the deed recites that it is of record.

Johnstone vs. Scott, 11 *Mich.,* 232.
Wiley vs. Lovely, 46 *Mich.,* 83.

I have endeavored to briefly state the technical rules as to the interpretation of deeds and their essential formal parts, but it may be observed that the present tendency of the courts is to look to these rules only as a guide in an honest endeavor to arrive at the true intention of the parties, and to administer justice in the individual case.

This condition can be largely attributed to the lack of skill and want of knowledge on the part of those assuming the preparation of conveyances.

WHAT IS INCLUDED IN THE DESCRIPTION.

Grants of land abutting upon a street or highway generally carry title to the center of the highway in the absence of a reservation.

Where a land owner lays out a street or highway upon one side of his land and grants a parcel adjoining, the grant carries the entire street.

Haberman vs. Baker, 28 *N. E.,* 370 (*N. Y.*).

There is no such presumption in a conveyance by a city where the city holds the fee of a street.

Graham vs. Stern, 61 *N. E.,* 691 (*N. Y.*).

Where the grantor has rights beyond the margin of the street this rule does not apply.

Banks vs. Ogden, 2 *Wall.,* 57.

Where land is described as bordering upon water, such as a lake or stream, the rule is that the grant carries all the title the grantor has to the submerged land.

In Michigan the courts hold that the title to the bed of the Great Lakes is in the State in trust for the people.

Ainsworth vs. Hunting Club, 159 *Mich.,* 61.
State vs. Venice American Land Co., 160 *Mich.,* 680.

Adverse possession will not run against the state.

Supra.

In Michigan the riparian owner of land bordering upon a river has title to the middle of the main channel or thread of the stream whether navigable or not navigable.

Hall vs. Alford, 114 *Mich.,* 165.
Lorman vs. Benson, 8 *Mich.,* 18.
Ryan vs. Brown, 18 *Mich.,* 196.

This rule I believe obtains in all the states as to the non-navigable streams.

As to navigable streams some states hold the same rule, others hold that private ownership extends to low water mark and others that it extends to high water mark.

The rule governing private ownership in the beds of

small inland lakes is not settled nor uniform in the states nor in Michigan. The Court has enunciated the dictum:

> "No fixed rule ever has been or ever can be laid down for the division of the territory covered by inland lakes."

The section line rule is laid down in

Clute vs. Fisher, 65 *Mich.,* 48,

but repudiated in

Grand Rapids Ice Co., 102 *Mich.,* 227.

The rules governing riparian rights seem to have been observed in

Lincoln vs. Davis, 53 *Mich.,* 390.
Grand Rapids Ice Co. vs. Ice Co., 102 *Mich.,* 227.

The rule that private ownership extends to the center seems to have prevailed in

Weber vs. Pere Marquette Boom Co., 62 *Mich.,* 626.

Private ownership was recognized and the dictum stated advanced in

Pittsburg Iron Co. vs. Lake Superior Iron Co., 118 *Mich.,* 109.

Easements appurtenant to the land will pass without specific mention.

Walz vs. Walz, 101 *Mich.,* 167.

Easements which are not appurtenant are unassignable and will not pass if they are mentioned.

J + C Waters. Rip. owners +
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Riparian rights pass with the deed without specific mention, unless they are specifically reserved.

Grand Rapids Ice & Coal Co. vs. South Grand Rapids Ice & Coal Co., 102 *Mich.*, 227.

Riparian rights in the submerged lands of streams are bounded by lines running at right angles to the thread of the stream.

A. N. Campau Realty Co. vs. Detroit, 102 *Mich.*, 243.

This rule does not apply to the Great Lakes.

Blodgett & Davis Lumber Co. vs. Peters, 87 *Mich.*, 498.

Meander lines are not ordinarily boundaries.

Twogood vs. Hoyt, 42 *Mich.*, 609.
Palmer vs. Dodd, 64 *Mich.*, 474.
Clute vs. Fisher, 65 *Mich.*, 48.
Arnold vs. Boelchel.

Where a wife joins in the execution of a deed with her husband and individually owns a part of the land described, such deed will convey her entire interest, both her dower and her fee, or other interest, without recital of any kind.

Hewmiller vs. Hathaway, 60 *Mich.*, 391-4.

The fact that she does not join in the covenants does not change the rule.

Clow vs. Plummer, 85 *Mich.*, 550-552-553.

HABENDUM.

At common law the habendum contained the limitations of the estate granted, that is, it determined the duration, whether in fee for life or in tail.

In modern deeds the words of limitation are usually contained in the premises following the operative words, but the habendum is retained and amounts to a repetition of the limitations. The result is that the habendum only comes in question when it conflicts with the premises.

Michigan has adhered to the common law rule that the estate limited in the premises cannot be abridged by the habendum.

Smith vs. Smith, 71 *Mich.,* 633.

But in following the rule that the intention of the parties is to be determined from the whole instrument and carried out, the Court has held that a repugnant habendum will control the granting clause in the premises when such is the intention of the parties.

Wilson vs. Ferry, 130 *Mich.,* 73.

As has been stated, the words of inheritance "heirs" is in the absence of statute essential to create an estate in fee. There are exceptions to this rule:

(a) When the grant is made to a trustee and an estate in fee is necessary for the purposes of the trust, a fee will pass without words of inheritance.

(b) The word "heirs" is not appropriate in a grant to a corporation, and while the word "suc-

cessors" is usually substituted, it is not essential to pass a fee.

Delhi School Dist. vs. Everett, 52 *Mich.,* 314.

(c) Words of inheritance are not essential to an executory contract to convey.

(d) I believe words of inheritance were never essential to a devise in a will.

TENENDUM.

The tenendum was formerly used to define the kind of tenure under which and of whom, whether the lord or the grantor, the land was held and was coupled with the habendum. All that remains of it in modern conveyances is the words, "To Have and to Hold," which apply to the habendum as well.

REDDENDUM.

The reddendum at common law contained the reservation of something new and distinct from the land, as a rent or service.

In modern conveyances such reservations are generally incident to conditions.

Often in describing lands in modern deeds a general description is used with an exception of a certain specific part of the lands, which is termed a reservation. This is a technical error. Such as right or interest is an exception. It is a part of the existing thing granted. A reservation refers to something which had no existence in connection with the property in question until created by the deed.

This distinction is best illustrated by a grant of a lot excepting a strip of land twenty feet in width along the west side thereof. The grantor would own the fee of the 20 foot strip, could sell it or build upon it. It is a part of the lot which had an existence prior to the making of the deed and comes within the technical definition of an exception.

Suppose a grant of a lot was made reserving a right-of-way over the west 20 feet. This would create an easement which had no previous existence and be a technical reservation. This distinction was important because a reservation except when in the nature of an easement appurtenant to other lands, unless reserved to the grantor and his heirs, terminated with the grantor's life.

Negaunee Iron Co. vs. Iron Cliff Co., 134 *Mich.*, 264.

Reservations of rights-of-way are now regarded as appurtenances and pass with grants of the land.

Lothrop vs. Eisner, 93 *Mich.,* 599.

If excepted the title would not pass by the grant.

There has been so much confusion in the use of the technical words, excepting and reserving, that they are now held synonymous.

Negaunee Iron Co. vs. Iron Cliff Co., 134 *Mich.*, 280.

Generally a reservation in favor of a stranger to the deed is void, but the courts have at times avoided this principle in carrying out the intentions of the parties.

Martin vs. Clark, 102 *Mich.,* 267.

Reservations repugnant to the grant are generally void.

The words "excepting" or "saving and excepting" are the operative words of an exception and the "reserving" are the appropriate words for the creation of this right. It will be wise to use one or the other and not couple them together in preparing conveyances and add the words of inheritance to all reservations if they are designed to be perpetual, though, as stated, the modern doctrine would seem to be that the intention of the parties prevail and words of inheritance are not necessary to a perpetual reservation or exception.

Lothrop vs. Eisner, 93 *Mich.,* 599.
Negaunee Iron Co. vs. Iron Cliff Co., 134 *Mich.,* 264.

Whether the words "saving and reserving" reserve title to land or only an easement over land is to be determined from the intention of the parties.

Bolio vs. Marion, 130 *Mich.,* 82.

CONDITIONS.

The technical language of a condition is: "Provided always this grant is upon condition."

Conditions are divided into conditions precedent and subsequent.

Conditions precedent must be fulfilled before the estate will vest.

Conditions subsequent are such as affect or defeat an estate already vested.

The law favors present vesting of estates, but the manifest intention of the grantor must be observed.

Johnson vs. Warren, 74 *Mich.,* 491.

The courts do not look upon conditions with favor. The court of equity generally refuses to enforce them.

Barrie vs. Smith, 47 *Mich.,* 130.

The courts are inclined to construe conditions as covenants and to construe conditions strictly against forfeitures.

Barrie vs. Smith, 58 *Mich.,* 314-318.

When an estate is granted upon condition, and upon the failure to perform, or in case of breach, there is a grant over to a third person, the interest of the third person is termed a conditional limitation.

The most common example of the use of conditions are in deed from parent to child on condition of support and maintenance. Restrictions upon the use of property are often framed as conditions, but more frequently as covenants.

Conditions requiring illegal acts are void.

Conrad vs. Long, 33 *Mich.,* 78.

Conditions restraining alienation generally are held void as repugnant to the grant.

Mandelbaum vs. Mc Donnell, 29 *Mich.,* 78.

We have a general statutory provision to the effect that when conditions are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed they may be disregarded.

§8828 Comp. Laws, 1897.
C.L. Mich, 1915 - 11564

There is another statutory restraint.

The absolute power of alienation shall not be suspended by any condition or limitation whatever for a longer period than the continuance of two lives in being at the creation of the estate, except in the single instance menitoned in the next section.

§8797 Comp. Laws, 1897.
C.L. Mich. 1915 - 11533

A contingent remainder in fee may be created on a prior remainder in fee, to take effect in event the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

§8798 Comp. Laws, 1897.
C.L. Mich. 1915 - 11534

The sections referred to are found in the chapter of the statutes entitled "Estates in Real Property." This chapter, together with the succeeding ones, entitled "Uses and Trusts," and "Powers," were adopted in Michigan in the revision of the statutes of 1846, which went into effect March 1, 1847. These chapters were borrowed from the State of New York, with the construction placed upon them by the New York courts, and the New York act was, I believe, a modification of the English Thellusson act.

These chapters codify the law upon Estates in Real Property, Uses and Trusts, and Powers, and expressly abolish the common law trusts and powers and prohibit many an estate valid at common law.

Wisconsin has copied the Michigan statute and Minnesota has copied Wisconsin in a modified form.

The three chapters may be termed the "Conveyancers' Constitution," as many a will and deed will be a legal disaster when the statutory rules are applied.

The subject of Suspension of Alienation is covered by a text book written by Stewart Chaplin, a New York writer, based upon the New York statute, which is the only authority upon the subject aside from decided cases.

New York, Michigan, Wisconsin and Minnesota have similar statutes as has England in the Thellusson act. The statutes in New York apply to both real and personal property, and in the other states mentioned to real property only, and abrogate the common law rule against perpetuities so far as real property is concerned, and as to both real and personal property in New York.

Wisconsin has held that the statute abrogates the rule against perpetuities and that there is no limitation upon tying up personal property in absolute perpetuity.

The decisions of other states are inapplicable.

Alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

§8796 Comp. Laws, 1897.

C.L. Mich. 1915 — 11532

This subject is closely connected with the subject of Uses and Trusts and will be given further consideration when that is reached.

COVENANTS.

So far as definitions go, a covenant may be said to be synonymous with a contract.

As used in deeds, a covenant is usually an agreement or undertaking as to the truth of certain facts or to do or not to do some particular thing.

A covenant is not in any manner essential to a deed so far as the effect of the instrument to pass a present estate in the lands is concerned. Though, as has been stated, a deed with the usual covenants, generally termed a warranty deed, passes an after acquired title and the purchaser under a deed without covenants prior to the statute of 1915 could not claim the position of a bona fide purchaser for value under the recording laws.

The legal effect of a deed with covenants to pass an after acquired title cannot be varied by parol evidence.

Dye vs. Thompson, 126 *Mich.,* 597.

A quit claim deed can never pass a subsequently acquired title not owned in equity at date of delivery.

Frost vs. Missionary Society, 56 *Mich.,* 49.
Fay vs. Wood, 65 *Mich.,* 390.

The general use of covenants for title probably arose upon the passage of the statute of uses.

A warranty was an incident of every feudal grant and the obligation to warrant and defend was generally fulfilled with the mailed fist and the lance, which were the original source of title to land.

Under the Michigan Statutes no covenant shall be implied in any conveyance whether the instrument contains covenants or not.

§8959, Comp. Laws.
C.L. Mich — 1915 — 11691

No particular form or language is essential to create a covenant. Any words evidencing an intention to be bound to do or not to do a particular thing are sufficient.

Johnson vs. Hollenworth, 48 *Mich.,* 140.

Several covenants may be blended into a single sentence.

Supra.

A recital in a deed may operate as a covenant.

Deeds as executed in modern times are usually signed only by the grantors. However, covenants contained in a deed to be performed by the grantee are usually binding and enforcible without his signature, the grantee's acceptance of such a deed and enjoyment of the estate granted being sufficient evidence of his assent to the covenant.

Crawford vs. Edwards, 33 *Mich.,* 354.

The above rule is criticised in many of the states, but prevails in New York, Michigan and New Jersey.

The most common illustration of this principle is the grant of a parcel of land with a statement in the deed that it is subject to a mortgage described which the grantee assumes and agrees to pay.

Crawford vs. Edwards, 33 *Mich.,* 354.

COVENANTS FOR TITLE.

The usual covenants for title are:

1. The covenant of seizen.
2. The covenant of good right to convey.
3. The covenant against incumbrance.
4. The covenant of quit enjoyment.
5. The covenant of warranty.
6. The covenant of further assurances.

The effect of the covenants is always limited to the land described and to the estate conveyed.

COVENANTS OF SEIZIN.

This covenant is usually in the words, "he is well seized of the above granted premises in fee simple."

The effect and meaning of the covenants of seizin vary in the different states.

In most of the states it is an undertaking that the grantor has an indefeasible title in fee.

Peck vs. Houghtaling, 35 *Mich.,* 126.

In other states mere possession under claim of title

will satisfy it. This is the rule in Massachusetts, Maine and Ohio.

The covenants of good right to convey is generally looked upon as an incident of the covenant of seizin, though it is sometimes used in conveyances under powers, and is rarely found in the forms of deeds in common use, except under the circumstance stated.

These covenants are broken at the date of delivery of the deed if at all.

They do not run with the land.

This is a common technical expression and means that if "A" conveys to "B" with the covenant of seizin and of good right to convey, and "B" conveys to "C" with like covenants, and "A" has no title, it follows that "B" would not derive title, nor would "C." "C" could sue "B" but he could not sue "A." The reason of this is that the covenant of seizin by "A" being broken when made becomes a right of action in favor of "B" and was such a right separate and distinct from the title to the land at the time "B" conveyed to "C" and would not pass under the deed.

Under the doctrine that the covenants of seizin is an assurance of title, a breach occurs:

1. Where there is an outstanding title in a third person.
2. Where there is an outstanding interest in a third person.
3. Where there is a want of title to buildings or other things affixed to the land.

The covenant of seizin being broken when made, the statute of limitations runs against an action upon it from the delivery of the deed.

COVENANT AGAINST ENCUMBRANCES.

The covenant against encumbrances usually follows the covenant of seizin and is in the words, "they (referring to the above granted premises) are free and clear from all encumbrances whatever."

This covenant, like the covenant of seizin, is broken when made, it does not run with the land, and the statute runs against an action upon it from the delivery of the deed.

Pease vs. Warner, 153 *Mich.,* 140.

This covenant is broken by:

The existence of an unpaid mortgage.

The existence of an unpaid valid tax which had become a lien at the date of delivery of the deed.

A restriction upon the use of property.

An easement such as a right-of-way over the premises.

An outstanding lease is an encumbrance.

Simon vs. Diamond Match Co., 159 *Mich.,* 241.

In most states an outstanding right of dower is an encumbrance.

Any right in the land vested in a third person which

tends in any manner to diminish its value may generally be said to be an encumbrance.

Simon vs. Diamond Match Co., 159 *Mich.,* 241.

Encumbrances are of two kinds, those which affect the title, such as money charges, mortgages, etc., and those which affect the physical condition of the property, such as a public road or an alley or right-of-way.

Knowledge of the existence of an encumbrance affecting the title by the grantee prior to the conveyance is no defense to an action upon the covenant.

Whether an action will lie upon the covenant against encumbrances because of the existence of a burden or servitude visible to all, such as a public highway or alley, is an open question. The court of equity has refused to enforce the covenant as to such a right.

Haldane vs. Sweet, 55 *Mich.,* 196.

Probably the weight of authority is that such a right is a breach of the covenant. Such is the rule in New York, Alabama, Connecticut, Indiana, Maine, Missouri, Mississippi, New Hampshire, Vermont and Virginia.

Huyck vs. Andrews, 20 *N. E.,* 581.

The opposite rule prevails in Wisconsin, Georgia, Iowa, and Pennsylvania.

COVENANT OF QUIET ENJOYMENT.

The covenant of quiet enjoyment is ordinarily found in leases in the words, "may quietly and peacefully

have, hold and enjoy the premises for the term aforesaid."

In deeds it is generally regarded as synonymous with the covenants of warranty.

COVENANT OF WARRANTY.

The covenant of warranty is generally expressed in the words, "will warrant and defend the same (the land granted) against all lawful claims whatsoever."

This covenant differs from the previous covenants in that the grantee must either have been prevented from taking possession, or, having taken possession, must have evicted to constitute a breach.

Mere existence of an outstanding title will not amount to a breach of the covenant of warranty.

Rights which amount to breaches of the covenant against encumbrances, if an eviction occurs through them, are breaches of the covenant of warranty.

The eviction must be under a lawful, paramount or superior title.

A voluntary surrender of possession of the land by the covenantee, either before or after judgment, is an eviction.

Should the covenantee voluntarily surrender possession, the burden of proving the validity of the paramount title would be upon him in an action of covenant.

The practice is to await the institution of suit and give notice to the grantor to defend the action. If such notice is given, the warrantor is bound by the judgment in an action by the covenantee.

Mason vs. Kellogg, 38 *Mich.,* 132.

The covenants of warranty and quiet enjoyment run with the land; that is, an evicted purchaser may sue any prior grantor whose covenant was made when the paramount title existed.

The covenant of warranty running with the land inures to the benefit of a purchaser under a quit claim deed or on foreclosure of a mortgage.

That is, the purchaser under a quit claim deed can sue the earlier grantors for breach of covenant or warranty. That is, though he has no action against his immediate grantor, he may sue the grantor of the person from whom he purchased for breach of such covenants as run with the land if the paramount title existed prior to his deed. This is merely the application of the doctrine of a covenant running with the land.

Covenants apply only to the land and the interest granted.

A deed to "all the right, title and interest of a person in a piece of land," followed by full covenants, amounts to a quit claim deed, if the grantors had no title. The covenants attach only to the estate conveyed. Such a deed conveys whatever interest the grantor had.

The covenant of further assurances is not in common use. It was an agreement to execute such additional

deeds or conveyances in the future as should be found necessary to vest the title, and usually was in the form, "that he will at any and all times hereinafter, upon the reasonable request at the proper cost and charge of the second party, his heirs and assigns, make, execute, and deliver all and every such further and other lawful and reasonable acts, conveyances and assurances for more effectually vesting and confirming the granted premises in the second party as his counsel, learned in the law, shall reasonably devise or require."

The word "assurance" as used at common law, was synonymous with the word "deed" as used at the present time.

The forms of deeds in common use have a blank space following the covenant against encumbrances, and also following the covenant of warranty. When an encumbrance is to be excepted it must be excepted from both covenants.

If a mortgage were excepted from the operation of the covenant against encumbrances, but not from the covenant of warranty, it would not relieve the grantor from this obligation under the covenant of warranty.

Welton vs. Welton, 109 *Mich.,* 356.

So an exception from the covenant of warranty without an exception from the covenant against encumbrances might leave an opening for an action for breach of the latter covenant.

In the drafting of covenants in conveyances where husband and wife join as grantors, remember the limited capacity of a married woman to contract.

Her joint or several covenants in grants of land in which she has only an inchoate dower or in which she is a tenant by entireties are not binding upon her.

COVENANTS AS TO USER OF LAND.

In conveyances of city property, a covenant restricting the use of the property, commonly termed "building restrictions," is often inserted.

All restrictions upon the use of land must be read with the statutory provision in mind:

> "When any conditions annexed to a grant or conveyance of lands are purely nominal and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as of forfeiture of the lands conveyed subject thereto."
>
> §8828 Comp. Laws, 1897.
> C.L. 1915, Mich — 11558

They must be read with the rule in mind founded upon public policy, that the law favors the free and absolute ownership of real estate, and the use of the same by the owner in such manner as he may desire, always considering that his neighbors have similar rights, which must not be trespassed upon.

The general principal has been laid down that every owner of the fee in land, when he conveys a part of it, may impose such a limitation upon its use as will prevent the grantee and those claiming under him from making any use of the part conveyed that will impair the value of the part retained.

This right is subject to the limitation that it must be exercised reasonably and with a due regard to public policy and the statutory limitation quoted.

The remedies for a breach of the covenant are an action for damages or an injunction for a threatened breach, the latter being the only effective remedy.

The court of New York has held in this connection that the granting of an injunction is discretionary and has laid down the rule:

> "Where the conditions of the adjacent property have so changed that the restricted property is no longer desirable for the use for which it was designed there is no ground for equitable relief."

It is not necessary that the change in character of the neighborhood extend to all the property affected by the covenant.

> *Trustees of Columbia College vs. Thatcher,* 87 *N. Y.,* 311.

The Massachusetts court has enunciated the rule that the courts will not compel the observance of restrictions and conditions when they have ceased to be of any benefit.

> *Jackson vs. Stevenson,* 31 *N. E.,* 691.

The Michigan court recognized the doctrine in a dictum:

> "It is entirely possible that the time may come when the maintenance of these conditions will be of no benefit to defendant or his grantees. In

such a case the complainant would no longer be compelled to maintain them."

Abraham vs. Stewart, 83 *Mich.,* 10.

The doctrine was recently recognized, but a ruling was made that the facts in the particular case did not warrant its application, in

Moore vs. Curry, 176 *Mich.,* 456.

The construction and interpretation of building restrictions depend largely upon the language used and particularly upon the acts of the parties interested in the land included in the subdivision, making a practical construction of their understanding of the meaning of the restrictive covenants.

The following are the leading Michigan cases involving building restrictions:

Frink vs. Hughes, 133 *Mich.,* 63—Construing the restriction upon King Avenue and enjoining the erection of a photograph gallery upon the rear of a lot restricted to residence purposes only.

Harris vs. Rorabacher, 137 *Mich.,* 292—Construing the restrictions upon Woodland Avenue enjoining the erection of a two-family flat upon land restricted to be used and occupied for *one dwelling house.*

James vs. Irvine, 141 *Mich.,* 376—Construing the restrictions upon Euclid Avenue and refusing to enjoin a two-family flat upon land restricted to be used and occupied for a dwelling. The decision in the case was based on the "conduct of the original grantors and their grantees showing their understanding," rather than upon the language of the covenant.

Bignall vs. Young, 151 *Mich.,* 69—Construing the restrictions upon Melbourne Avenue and enjoining the erection of a two-family flat upon land restricted to be used for "nothing but *a two-story dwelling house.*"

Tillotson vs. Gregory, 151 *Mich.,* 128—Construing the restriction upon Chandler Avenue and refusing to enjoin a flat upon lands restricted to residence purposes, and ruling that a restriction limiting the space between the buildings and side lines of the lots had been waived by the acts of the parties.

Stott vs. Avery, 156 *Mich.,* 674—Holding that an owner of restricted land who attends a public sale of other lands in the subdivision which are offered free from restrictions, and who does not protest, is estopped from enforcing the restriction against the purchasers.

Allen vs. City of Detroit, 167 *Mich.,* 464—Construing the restriction upon Cadillac Avenue, enjoining the erection of a fire engine house upon lands restricted to residence purposes, laying down the principle that a failure to insert the restrictions in all conveyances will not defeat the restrictions if they have been maintained from their inception, and that restrictions are binding upon municipalities as well as private individuals.

Erichsen vs. Tappert, 172 *Mich.,* 457—Construing the restriction upon Chandler Avenue and enjoining the erection of a store and flat upon the rear of the lot, but facing an unrestricted street, the land being restricted to dwelling house purposes.

Schadt vs. Brill, 173 *Mich.,* 647—Construing the restriction upon Helen Avenue, enjoining the erection of a duplex flat, with a single entrance, on land restricted to be used for a *dwelling house,* though a double house

had been erected on the extreme end of the subdivision.

Main vs. Davis, 176 *Mich.,* 443—Construing the restrictions on Alger Avenue and enjoining a small factory upon the rear of a lot restricted to residence purposes.

Moore vs. Curry, 176 *Mich.,* 443—Construing the restrictions on Currystone or Grand Avenue and enjoining a store on the Woodward Avenue frontage.

Kingston vs. Burch, 176 *Mich.,* 566—Construing the restrictions on Josephine Avenue and enjoining a duplex flat upon lands subject to a restriction, the premises to be used for residence purposes only and no dwelling house to be erected costing less than $2,000, the decision being based on the fact that the practical construction of the land owners had been to a user for single dwellings.

Misch vs. Lehman, 178 *Mich.,* 225—Involving the same restriction as in *Schadt vs. Brill,* holding that one breach of the restriction alone acquiesced in will not estop its enforcement, and that an injunction should not be perpetual, but should be subject to modification if future changes in the neighborhood makes its continuance inequitable.

Hartz vs. Kales Realty Co., 178 *Mich.,* 560—Enunciating the doctrine that a person accepting a conveyance of a piece of restricted land adjoining unrestricted land previously owned by the grantee, containing an agreement that grantee would use his entire land according to the restriction, is bound thereby, though the agreement was not signed by him.

Stewart vs. Clark, 181 *Mich.,* 408, 21 *D. L. N.,* 766—Construing a restriction involving building line.

Langton vs. Stedman, 21 *D. L. N.,* 961—Ruling that the comparative damage to the complainant is of no importance and that delay and acquiescence will not defeat the remedy by injunction unless continued so long as to defeat the right itself.

Zoellar vs. Goldberg, 21 *D. L. N.,* 1090—Construing the restriction on Chandler Avenue, holding that the rear of a lot restricted to residence purposes could not be used for other purposes than a corner with a frontage on another street.

Lambrecht vs. Graulich, 22 *D. L. N.,* 687—Holding that when a vendor owning several lots sells one without restriction and later sells his remaining lots restricted, the lot first sold cannot be subjected to such restrictions.

CONCLUSION.

The conclusion of a deed is a formal statement of the fact of its execution and the date thereof. It is not essential to the validity of the instrument.

SIGNING.

At common law, signing of a deed was unnecessary, sealing and delivery being the essential formalities.

Signing is generally necessary in the United States under the statutes.

§8956 Comp. Laws, 1897.

C.L. Mich, 1915 - 11685

It is customary to sign the instrument at the end, but a signature in any part of the instrument followed by delivery has been held sufficient.

The manual act of signing may be by the person or by some other person in his presence at his direction or by mark.

SEAL.

Sealing was at common law of vital importance and took the place of signing. As I understand it, the seal was a substitute enabling the illiterate to identify their acts. In most of the United States, the necessity of sealing has been abolished by statute, though a seal is still essential to the validity of deeds in New York and Vermont.

Under the Michigan statutes a scroll or device used as a seal is of the same effect as a seal.

§9005 Comp. Laws, 1897.
C.L. Mich 1915 — 11740

The statute provides that a conveyance shall not be deemed invalid for want of a seal or scroll.

§10417 Comp. Laws, 1897.
C.L. Mich. 1915 — 12850

The seal of a corporation affixed to a conveyance is presumptive evidence that the execution was authorized by the corporation.

Merritt vs. Montgomery, 25 *Mich.,* 72.
Benedict vs. Denton, Walk. Ch., 336.

WITNESSES.

Witnesses are not essential to the validity of a deed either at common law or in this state so far as its validity is concerned. They are, however, essential to entitle a deed to record, if executed in this state, and under the recording laws of many of the states.

The witnesses to a deed may be any persons capable of understanding the act having no interest in the transaction.

Parties to the instrument should not be witnesses to the signature of other parties, and husbands and wives being generally disqualified as witnesses for or against the other should not act as witnesses to the conveyances of each other.

There prevails an unwarranted contempt for the formality of witnessing the execution of written instruments.

If it becomes necessary to prove the execution of an instrument some years later, the subscribing witness will usually recognize his signature but may have no recollection of the transaction. Suppose you as a subscribing witness are under examination on oath and asked: How do you know that the grantor signed this deed? Have you not at request signed your name as a witness when in fact you did not see the instrument executed? How do you know that this was not one of those kindly acts? There is only one course:

> Never subscribe your name as a witness to the execution of any instrument unless you see the maker affix his signature or the maker in your presence declare the existing signature to be his,

otherwise, as no man's memory is infallible, your name as a subscribing witness will ever be a menace to any instrument whether rightfully or wrongfully attached.

DELIVERY.

Delivery of a deed is as essential to the validity of modern conveyances as was livery of seizin to the feudal feoffment. Delivery may be said to take the place of livery of seizin.

No grant is valid without delivery of the deed. What amounts to a sufficient delivery is generally a question of intention. It involves two elements, transfer of control of the instrument by the grantor and acceptance by the grantee.

Delivery must be made in the lifetime of the grantor.

Taft vs. Taft, 59 *Mich.,* 185.

Acceptance by the grantee is presumed.

Possession of the instrument by the grantee is presumptive evidence of delivery.

Recording is *prima facie* evidence of delivery.

Jourdan vs. Patterson, 102 *Mich.,* 602.
Holmes vs. Mc Donald, 119 *Mich.,* 503.

Parting with control of the deed by the grantor is the essential element of delivery.

Whether or not delivery has been made comes into question most frequently when deeds are made, but the grantor desires to suspend their effect during his lifetime.

As to such cases where the instrument is fully executed but retained by the grantor in his possession and control, they are usually invalid.

When the deed is delivered to a third person to be delivered by him to the grantee after the grantor's death, if no control is retained by the grantor this delivery is sufficient.

Such a transaction is generally termed a delivery in escrow, but this is not technically correct. When the delivery is made to a third person unconditionally except to await the death of the grantor, delivery is regarded as made when deposited. A technical escrow is a delivery to a third person to be delivered by the third person to the grantee on performance of some conditions, as payment of money. In such a case there is no legal delivery until the second delivery is made.

A delivery to a third person to be delivered to the grantee without any conditions attached, will pass title to the premises though a devise of the land to another is made at a later date.

If the grantor in delivering to the third person retains a right to recall the instrument, there is no delivery and the deed will be void.

There is an exception of the foregoing rules in case of government patents. Delivery of a patent is not essential. Such a medium of transferring title is akin to the common law transfers of title by record in which livery of seizin was unnecessary. It is an act of the sovereign power.

Though the deed in question has been delivered if it appear from the contents of the instrument that it was intended to take effect only in event of the grantor's death, it may be construed as a will and not a legal grant of land.

Bigley vs. Souvey, 45 *Mich.,* 370.
Leonard vs. Leonard, 45 *Mich.,* 503.

ACKNOWLEDGMENT.

As a general rule the acknowledgment of a deed is a requisite of the recording laws, but is not essential to its validity.

Taylor vs. Young, 48 *Mich.,* 268.

In Ohio acknowledgment is essential to the validity of the instrument.

An acknowledgment is a declaration before a competent officer by a person that the execution of a particular instrument or writing is his free act and deed.

Who is a competent officer is wholly a matter of statutory law, but the most common official is the notary public, whose authority is generally recognized by the laws of all states and countries.

The notary was originally one who took notes of judicial proceedings under the Roman law, and was an important personage under the canon law and in European countries generally. I believe in Canada commissions are not issued indiscriminately as in the United States.

The notary originally kept a record of his acts. The Michigan statutes expressly provide for the preservation of such records on retirement from office, but do not expressly require the keeping of records.

The certificate of acknowledgment must contain:

1. Venue or locality, that is state and county.
2. Date of acknowledgment.
3. Before whom acknowledged.
4. That the grantor personally appeared.
5. The grantor's name.
6. The officer's acquaintance with grantor.
7. The fact of acknowledgment.
8. The officer's signature.
9. In some states the officer's seal.
10. In some states the date the officer's commission expires.

A substantial compliance with the above requirements is generally sufficient.

An officer who certifies the acknowledgment of a stranger is liable, together with his bondsmen, for damages.

Doran vs. Butler, 74 *Mich.,* 643.

Identification or introduction by a common acquaintance of respectable standing in the community should

always be required. The notary is bound to inform himself of the identity of the person.

Cameron vs. Culkins, 44 *Mich.,* 531.

Interest in the transaction will disqualify the notary to act.

The Michigan legislature has determined that interest in a corporation or even being an officer in the corporation does not disqualify a notary to act unless the notary is individually or officially a party to the instrument.

Act No. 18, Public Acts Mich., 1909.

The notary's certificate must be based upon his personal knowledge. If he does not understand the language of the person desiring to acknowledge an instrument he cannot utilize the services of an interpreter.

Dewey vs. Campau, 4 *Mich.,* 565.
Harrison vs. Oakman, 56 *Mich.,* 346.

The law provides for the administration of oaths through interpreters, but no such authority is given to the notary; he must know the facts to which he officially certifies of his own knowledge.

In Michigan, notaries are appointed for the county in which they are domiciled but they may act anywhere in the state.

If a notary appointed for Wayne County acts in Macomb County, the venue of his certificate would be Macomb County, it would recite that the party appeared "before me the subscriber, a Notary Public in and for

the County of Wayne, acting in the County of Macomb." He should sign "Notary Public, Wayne County, Michigan, acting in the County of Macomb."

Notaries in Michigan since 1903 are required to add to their certificate the date of expiration of their commissions.

Act 18, P. A. Mich., 1903.

THE RECORDING LAWS.

From the earliest colonial days in America a system of public registration of conveyances of land has been provided, open to the inspection of the public generally.

Each state has provided by statute in what manner conveyances shall be executed to entitle them to record.

The present Michigan statutes require that deeds executed *within the state* be executed in presence of two witnesses who shall subscribe the instrument and that the grantor acknowledge the execution of the instrument before any

Judge, Clerk or Commissioner of a Court of Record, or

Notary Public,
Justice of the Peace, or
Master in Chancery.

§8962 Comp. Laws, 1897.
C. L. Mich, 1915 — 11694
Amended by Act 103, P. A., 1905.

The statutory manner of execution has varied from time to time.

Deeds executed *in any other state,* territory or district of the United States may be executed according to the laws of the place of execution and acknowledged before any

Judge of a Court of Record,
Notary Public,
Justice of the Peace,
Master in Chancery.

Or other officers authorized by the laws of the state, territory or district to take acknowledgments of deeds, or before a commission appointed by the governor of the State.

§8963 Comp. Laws, 1897.
C. L. Mich, 1915 — 11695

The acknowledgments taken in other states, except when taken before a commissioner appointed by the governor of the state, shall be authenticated with the seal of the officer.

If such officer has no seal a certificate of the clerk or proper officer of a court of record or the Secretary of State of the place under his seal of office shall be attached, stating that the person certifying was at the date of the certificate the officer represented, that he believes the signature genuine and that the deed is acknowledged according to the laws of the state.

§8964 Comp. Laws, 1897.
C. L. Mich. 1915 - 11696

Deeds executed in *foreign countries* may be executed

according to the laws of such country and acknowledged before any

Notary Public,
Minister plenipotentiary,
Minister extraordinary,
Minister resident,
Charge d'Affairs,
Commissioner, or

Consul of the United States appointed to reside therein, which shall be certified by the officer taking the same or if a notary, under his seal.

§8965 Comp. Laws, 1897.
C. L, 1915. Mich — 11697

This act is made retroactive.

The uniform act, § 9025 Comp. Laws, adds to the officers in foreign countries any

Minister,
Vice Consul,

Consular agent of the United States resident in any foreign country or port of entry, when certified under his seal of office.

Where deeds are not acknowledged, provision is made for proving them by subscribing witnesses.

§8969-8975, Comp. Laws, 1897.
CL Mich, 1915 — 11701 - 11707

Provision is also made for temporary filing of unacknowledged deeds.

§8976-8977, Comp. Laws, 1897.
C.L. Mich. 1915 — 11708 - 11709

The record of any conveyance executed in the manner required by law or a transcript thereof may be read in

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evidence in any court in the state without further proof, but the effect may be rebutted by other competent testimony.

§8990 Comp. Laws, 1897.

C.L. Mich 1915 — 12508

Any insrument executed in the same manner as a conveyance, except wills and promissory notes, is admissible in evidence without proof of execution.

§10168 Comp. Laws, 1897.

C.L. Mich - 1915 — 12529

Every conveyance of real estate not recorded shall be void as against subsequent purchasers in good faith and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall be first recorded.

§8988 Comp. Laws, 1897.

C.L. Mich 1915 — 11721

Act 199, P. A. 1915, has added to this section:

> "The fact that such first recorded conveyance is in the form of or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchasers or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

Conveyances as used above embrace every written instrument by which any estate or interest in land is created, aliened, mortgaged or assigned or by which the title of any real estate may be affected in law or equity, except wills, leases for less than three years and executory contracts for the sale of or purchase of land.

§8994 Comp. Laws, 1897.

C.L. Mich, 1915 — 11726

Land contracts are within the recording laws.

§9038 Comp. Laws, 1897.
C.L. Mich, 1915 — 11773

The recording laws do not make an unrecorded conveyance void between the parties. They only operate when the rights of subsequent purchasers are involved.

Sinclair vs. Slawson, 44 *Mich.,* 123.

The law requires the register to keep entry book of deeds, mortgages and a reception book of levies.

§8979 Comp. Laws, 1897.
C.L. Mich, 1915 — 11711

Instruments are to be considered as recorded when they are noted in the entry books.

§8980 Comp. Laws, 1897.
C.L. Mich, 1915 — 11712

This entry is notice, though the instrument is incorrectly recorded.

It supplies deficiencies.

Sinclair vs. Slawson, 44 *Mich.,* 123.

Patents from the United States do not come within the terms of the recording laws.

Moran vs. Palmer, 13 *Mich.,* 375.
Sands vs. Davis, 40 *Mich.,* 18.

An execution levy is now upon the same footing as a deed.

§9224 Comp. Laws, 1897.
C.L. Mich, 1915 — 12598 n

A subsequent purchaser under the above statute means a subsequent purchaser from the same grantor.

Smith vs. Williams, 44 *Mich.,* 244.

A grantee with actual notice of a prior deed or mortgage is not a bona fide purchaser.

Notice to an agent is notice to the principal.

Russell vs. Sweezney, 22 *Mich.,* 238.

Under the rule if an attorney has knowledge of unrecorded conveyances, his client is bound by his knowledge whether disclosed or not.

As heretofore stated a purchaser under a quit claim deed prior to August 23rd, 1915, is not a good faith purchaser.

This rule applies only to the purchaser accepting the quitclaim deed.

If one deriving title through quit claim deeds conveys to another by warranty deed, the latter may be a bona fide purchaser.

Otis vs. Kennedy, 107 *Mich.,* 312.

If the rule were otherwise, once a quitclaim deed entered into a chain of title, that title could never again come under the protection of the recording laws.

If one is a bona fide purchaser under the recording laws, a purchaser who had knowledge of prior defects in the title can purchase and stand in his place as a bona fide purchaser.

Godfrey vs. Disbrow, Walk., 260.

Otherwise the title of a bona fide purchaser would only be a protection to him and would not be saleable.

A purchaser from a purchaser with notice can be a bona fide purchaser; actual notice to the grantor is not actual notice to his grantee.

Holcomb vs. Mosher, 50 *Mich.,* 252.

You will observe that the adage, "one can convey no better title than he holds," fails when the recording laws are applied and that the contra proposition obtains.

It is a presumption of law that the subsequent purchaser who first records his deed is a bona fide purchaser without notice until the contrary is made to appear.

Godfrey vs. Disbrow, Walker, 260.

Possession of land is notice to all the world of the occupant's rights. He who buys, relying on the record title, without investigation of possessory rights, buys subject to the rights of the occupant. Cases sustaining the principle can be found through the reports from Harrington's Chancery to the last decision rendered by our court.

There is an exception to this rule. Where a grantor remains in possession after delivery of an absolute deed, his possession is not notice of an interest adverse to his deed.

Bloomer vs. Henderson, 8 *Mich.,* 395.
Mc Ewan vs. Kearney, 178 *Mich.,* 6.

This always seemed to me a rule making the common practice of deeding lands and taking a contract back on the loan of money a hazardous proceeding.

An instrument not executed in a manner entitling it to record is not notice.

Wing vs. Mc Dowell, Walker Chan., 102.

This rule has not been rigidly followed.

Sections 9048 to 9051, Comp. Laws of 1897, were passed in 1861 with a view of curing the blunders of the past and apparently anticipated that the conveyances of the future would not be infallible.

Section 8980 of the recording act provides that all absolute conveyances *not intended as mortgages* shall be recorded in books set aside for deeds and that all mortgages *and other deeds intended as securities* shall be recorded in books set aside for mortgages.

In applying this statutory rule the court has held that an owner making a deed of land to a third person, absolute upon its fce, which was immediately recorded as a deed, the third person giving back a contract to reconvey the land on payment of a sum of money, that the deed and contract constituted a mortgage and the record of the deed was not notice to a subsequent purchaser.

Grand Rapids National Bank vs. Ford, 143 *Mich..* 402.

STATUTORY REGULATION OF ESTATES IN REAL PROPERTY, USES, TRUSTS AND POWERS.

I have called your attention to some of the statutory provisions upon these subjects and their importance is such that possibly a quotation of some of the statutes will not be unwarranted.

ESTATES IN REAL PROPERTY.

§8796 of the Compiled Laws provides:

C.L. Mich. 1915 — 11532

> "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended where there are no persons in being, by whom an absolute fee in possession can be conveyed."

§8797 of the Compiled Laws provides:

C.L. Mich. 1915 — 11533

> "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section." (The University of Michigan is authorized to hold in perpetuity, Public Acts 1899, 126.)

11534

§8798, Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

C-L. M. 1915 — 11535

§8799 prohibits successive estates for life except to persons in being, and provides that where a remainder is limited on more than two life estates all life estates after the first two shall be void and the remainder shall take effect on the death of those persons.

§8800 prohibits the creation of a remainder on a term of years except the remainder be for the whole of the residue of the term. C.L. Mich, 1915 — 11536

§8802 prohibits the creation of a contingent remainder upon a term of years unless the remainder shall vest within two lives in being. C.L. Mich, 1915 — 11538

§8803 prohibits the limitation of a life estate as a remainder on a term of years except to a person in being at the creation of the estate. C.L. Mich 1915 — 11539

§8807 authorizes the creation of future estates in the alternative. C. L. Mich, 1915 — 11547

§8819 prohibits the accumulation of rents and profits of real estate unless the accumulation be directed to commence at the creation of the estate out of which the rents arise, and be for the benefit of a minor or minors in being and terminate with their minority, or C.L. Mich 1915 11553

The accumulation commences within the expiration of two lives in being and during the minority of the person to be benefited and terminate with the minority.

§8820 prohibits the creation of expectant estates except such as are authorized by Chapter 237, Compiled Laws. C.L. Mich 1915 11553

USES AND TRUSTS POWERS.

C. L. Mich '15 — 11565 + 11592

Sections 8829 and 8856 abolish the uses, trusts and powers known to the common law except so far as they are authorized by Chapters 238 and 239 of the Compiled Laws.

§8830 provides that all existing uses are confirmed as legal estates. C. L. Mich '15 — 11566

§8831 provides that every grant, assignment or devise giving the grantee actual possession of the land with the right to receive the rents and profits, gives the grantee a legal estate of the same quantity as his beneficial interest. C. L. Mich '15 — 11567

This statute abolishes passive trusts.

§8832 provides the preceding section shall not destroy the estate of a trustee where the title of the trustee is connected with some power or disposition or actual management. C. L. Mich '15 — 11568

§8833 provides that every disposition of land shall be made directly to the person in whom the right of possession and profits shall be intended to be vested and not to any other to the use of or in trust for such person. A grant contrary to the inhibition vests no estate in the trustee. C. L. Mich. '15 — 11569

The last two sections have been construed by the New York court in

LaGrange vs. L'Amoureaux, 1 *Barb. Ch.,* 16.
Kingo vs. Townsend, 36 *N. E.,* 513.

In the former case when a deed was made to one person for the use and benefit of several other persons, one of the several filed a bill in equity to compel the grantee named in the deed to convey to the beneficiary his interest in the estate. The court dismissed the bill, stating that under the statute referred to the party named as trustee took no interest in the land, but the legal title vested in the beneficiaries.

In the latter case the court held that where the party to whom land was conveyed as trustee for the benefit of others also had a beneficial interest, he would take the legal title and the statutory rule would not apply.

§8835 provides that where a grant for a valuable consideration is made to one person and the consideration is paid by another, no trust results in favor of the person paying the consideration. c. L. Mich. 1915 — 11571

§8836 and §8837 provide that this rule does not prevent creditors impressing the land with a trust to the extent of their claims nor does it apply where the grantee shall have taken the grant in his own name without the knowledge or consent of the party paying the consideration or where the grantee in violation of a trust purchases the land with the money of another. c. L. Mich '15 — 11572 — 11

§8838 provides that no implied or resulting trust shall be alleged or established to defeat the title of a purchaser for value without notice. c. L. Mich '15 11574

§8839 specifies the purposes for which trusts in lands may be legally created, viz: c. L. Mich. '15 — 1157

1. To sell lands for the benefit of creditors.
2. To sell, mortgage or lease lands for the

benefit of legatees or for the purpose of satisfying any charges thereon.

3. To receive the rents and profits of lands and apply them to the use of any person during the life of such person or for any shorter term *subject* to the rules prescribed in the last preceding chapter.

4. To receive the rents and profits of lands and to accumulate the same for the benefit of any married woman or for either of the purposes and within the limits prescribed in the preceding chapter.

5. For the beneficial interest of any person or persons when such trust is fully expressed and clearly defined on the face of the instrument creating it *subject to the limitation as to time prescribed in the preceding chapter.*

Any trust the purpose of which is not within the authority of this section is absolutely void.

The fifth subdivision is not found in the New York statute. This distinction must be remembered in applying the New York decisions.

§8840 provides that a devise of lands to an executor or trustee to be sold or mortgaged when the executor or trustee is not authorized to receive the rents and profits, give not title but only a power to sell or mortgage and the land descends to heirs or passes to devisees subject to the execution of the power.

§8841 gives rights to creditors in the surplus of rents and profits from a trust.

§8842 provides when a trust is created which is not authorized by the statute it may amount to a power.

§8844 provides that every valid trust shall vest the title to the land in the trustee that the *cestui que trust-ent* shall take no estate in the land but may enforce his beneficial right in equity.

§8845 authorizes one creating a trust to declare to whom the land shall pass upon failure or termination of the trust.

§8847 provides that no person beneficially interested in a trust for the receipt of the rents and profits of land can *assign or in any manner dispose of such interest,* but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable.

The New York court decided before Michigan borrowed this section that "gross" means one sum, not several fixed sums.

Hawley vs. James, 16 *Wend.,* 262.

§8843 provides that if a trust is not contained or declared in the conveyance to the trustee the deed shall be deemed absolute against subsequent creditors and purchasers from trustee for value without notice.

§8849 provides when the trust is expressed in the conveyance to the trustee, that every sale or act in the contravention of the trust shall be void.

§8850 provides that one paying money to a trustee shall not be responsible for the malfeasance of the trustee in applying the fund.

§8851 provides that when the purposes for which an express trust are created have ceased, the estate of the trustee shall cease.

POWERS.

§8856 abolishes powers except as authorized in the sections following.

§8857 defines power as an authority to do some act in relation to land or in the creation of estates which the owner might personally do.

§8858 provides that no person can create a power unless he is at the time capable of alienating some estate in the land to which the power relates.

§8860 defines a general power as an authority to convey in fee to any one.

§8861 provides that powers are special:

1. When disposition can be made only to designated persons.
2. When the estate that can be conveyed is less than fee.

§8862 defines a beneficial power as one in the execution of which no one other than the grantee or donee has any interest.

§8864 provides that when an absolute power of disposition not subject to a trust is given the owner of an estate for life or years, such estate shall be an absolute fee in respect to the rights of creditors and purchasers

subject to any future estate limited in case the power is not exercised.

§8865 makes the same provision, though no estate is granted the donee of the power.

§8866 provides that when such a power is granted and no remainder limited, the donee takes an absolute fee.

§8867 provides that when a general and beneficial power to devise the inheritance is given to a tenant for life or years he shall possess an absolute power of disposition within the meaning of the last three sections.

§8868 provides that every power of disposition shall be absolute when the donee may in his life time dispose of the entire fee for his own benefit.

§8869 provides that if the donor of the power reserves to himself the right of revocation he is still deemed the owner in fee so far as the rights of creditors and purchasers are concerned.

§8870 provides that a special and beneficial power may be granted:

1. To a married woman to dispose of during marriage any estate less than a fee belonging to her in lands to which the power relates.
2. To a tenant for life of the lands embraced in the power to make leases for not more than twenty-one years and to commence in possession during his life.

§8871 prohibits the life tenant assigning the power above separate from his life estate and that it shall pass

with an assignment of his estate unless specifically excepted and when so excepted it shall be extinguished.

§8872 provides that such a power may be released by the life tenant to the person entitled to the next expectant estate and such a release shall extinguish the power.

§8873 provides a mortgage by a life tenant having power to lease or a married woman holding a power as above does not extinguish the power but the power is bound by the mortgage in the same manner as the land embraced.

§8874 provides:

1. That the mortgagee is entitled in equity to the execution of the power so far as the satisfaction of the debt may require.
2. That any subsequent estate created by the owner in execution of the power is bound by the mortgage.

§8875 provides that only such beneficial powers as have been defined in the preceding sections shall be valid.

§8876 subjects special and beneficial power to the claims of creditors.

§8877 provides that a general power is in trust when any person other than the grantee is designated as entitled to the proceeds of a sale of the lands under the power or any part thereof.

§8878 provides that a special power is in trust, when a grant under it must be made to designated persons or persons other than the grantee are entitled to the benefit of its execution.

§8879 provides that the execution of every power in trust unless expressly made discretionary is imperative and imposes a duty that equity will enforce.

§8880 provides that a power in trust is imperative though the donee is authorized to select any and exclude some of the designated beneficiaries.

§8881 provides that when a power is to be executed in behalf of several persons they shall share equally in the benefits unless a contra distribution is designated.

§8882 provides that if the trustee is authorized to distribute in such proportion as he sees fit he may allot the entire fund to a part of the class and exclude others.

§8883 and §8884 authorize the Court of Chancery to execute a power in trust in event of the death of the donee or such a power in a will when no one is designated for the purpose.

§8885 makes Sections 8850 to 8855, relating to express trusts, applicable to powers.

§8886 authorizes the Court of Chancery to compel the execution of a power in trust for the benefit of creditors when the objects of the trust are assignable.

§8887 provides that the beneficial interest in power pass by an assignment for the benefit of creditors.

§8888 provides that the grantor in any conveyance may reserve to himself any power he could grant to another.

§8889 provides that powers may be created by a clause in a conveyance of some estates in the lands to which the power relates or by a devise in a last will or testament.

§8890 places powers within the operation of the recording laws.

§8891 makes powers irrevocable unless the right of revocation is reserved in the instrument creating the power.

§8892 makes any person capable of holding land capable of holding a power.

§8894 provides that when a power is vested in several, all surviving must unite in its execution.

§8895 requires a written instrument, sufficient to pass title to land, for the execution of a power.

§8896 provides that every instrument except a will made in execution of a power shall be deemed a conveyance and subject to the statutes relative to the execution and recording of deeds and mortgages.

§8897 provides that a power to alienate land by will can only be exercised through that medium.

§8898 contains a similar mandate as to the execution of a power to alienate by grant.

§8990 prohibits the donor from dispensing with the statutory requirements in the execution of a power.

§8901 provides if the grantor direct formalities in the execution of a power other than those required by the statute they may be ignored.

§8902 provides that nominal conditions not affording substantial benefit annexed to a power may be disregarded.

§8903 provides that the intention of the donor of a power shall be observed as to mode, time and manner of execution so far as it does not conflict with the provision of the chapters on powers.

§8904 provides that when the consent of a third person is requisite to the execution of a power that such consent shall be expressed in the instrument by which the power is executed or certified in writing on the instrument under the signature of the party. Such consent must be executed and acknowledged in the same manner as a conveyance to entitle the instrument to be recorded.

§8905 provides that a grant by the donee of a power in excess of his authority shall be valid to the extent he was authorized.

§8906 provides that it is unnecessary to recite or refer to a power in the instrument used in its exercise.

§8907 provides that the will of a testator purporting to devise all his estate shall pass land which he was authorized by a power to devise, in the absence of an intent to the contrary expressed or necessarily implied.

§8909 provides that a power granted by parent to a descendant shall be an advancement to the same extent and under the same circumstances that a gift of real or personal estate would be an advancement.

§8910 provides the date for the computation of time which alienation may be suspended by a power is the date of the instrument creating the power and not the date of the instrument used in exercising the power.

§8911 provides that no estate can be created by the execution of a power which the person could not have taken under the instrument creating the power.

§8913 and §8914 authorize the Court of Equity to remedy a defective execution of a power at the suit of beneficiaries or purchasers.

§8915 provides that the power of sale in a mortgage passes to the assignee or other person entitled to the money secured.

§8916 provides that the statutory provisions relative to power shall not apply to simple powers of attorney to convey lands.

The statutory provisions reviewed affect conveyancing in that they prohibit the creation of certain interest in land, regulate trusts and powers, define certain of the formalities incident to particular conveyances, and establish rules and limitations which if violated will render the most carefully drawn conveyance a legal disaster.

Trusts and powers are distinguished in that an ex-

press trust requires title to real estate in the trustee while title in the donee of a power is not requisite.

Where the donee of a power is the absolute and beneficial owner of the fee, the power is automatically merged in the fee.

A trustee may hold the legal title and a power at the same time; such a coincidence will not effect a merger.

SUSPENSION OF ALIENATION.

I have referred you to Mr. Chaplin for information upon this subject and I will only call your attention to some of his rules and principles and a few Michigan cases illustrating their application.

This rule arises from the application of the following sections of the Compiled Laws of 1897, viz:

§8796. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.

§8797. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section.

§8798. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event

that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

§8839. Express trusts may be created for any or either of the following purposes:

1. To sell lands for the benefit of creditors.
2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter.
4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed in the preceding chapter.
5. For the beneficial interest of any person or persons, when such trust is fully expressed, and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title.

§8847. *No person beneficially interested* in a trust for the *receipt of the rents and profits of lands can assign* or in any *manner dispose of such interest;* but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

§8910. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power, shall be computed from the time of the creation of the power, and not from the date of such instrument.

There are two primary elements to be considered, which are formulated by Mr. Chaplin into two rules, viz:

> "Rule I. ALIENABILITY—The power of conveying the absolute fee in possession shall not be suspended beyond the statutory period."

Under this rule he points out:

> (a) "It affects all estates, interests, rights and possibilities of every character which are capable of interfering with the power of conveying an absolute fee in possession."
> (b) "*It does not insist* upon *vesting* but absolute alienability."

The distinction suggested under the second subdivision is not generally appreciated by lawyers or jurists.

> "Rule II. VESTING—Estates in remainder shall be so limited that within the statutory period, if ever, they must vest in interest."

Under this rule he points out:

> "The rule applies only to remainders, but insists not only on absolute alienability but also upon vesting."

In the examination of decided cases you will often meet the dictum or rule that vesting alone is the controlling feature. Ordinarily a vested future remainder

is alienable, but a trust may be absolutely vested and be inalienable.

Alienability in connection with a trust means more than alienability of the specific lands in question. There may be power to alienate the specific land, but if the proceeds are held beyond the statutory period the transaction is within the rule.

Palms vs. Palms, 68 *Mich.,* 355.
Niles vs. Mason, 126 *Mich.,* 482.

Do not permit the apparent contra rule in *Thatcher vs. St. Andrew's Church,* 37 *Mich.,* 264, to mislead you. In the Thatcher case, as was pointed out by Justice Champlin in the Palms case and again in the Niles case, the *trust* terminated with the exercise of the power of sale and the *proceeds were distributed* to the beneficiary, *not held in trust.*

Where the power of sale is an imperative direction, and amounts to an equitable conversion, it will avoid the rule.

Ford vs. Ford, 80 *Mich.,* 42.

The statutory period must be directly or indirectly, but ultimately, measured by lives in being. No terms of years alone can be a valid measure of a trust term.

Casgrain vs. Hammond, 134 *Mich.,* 419.
State vs. Holmes, 115 *Mich.,* 456.
Farrand vs. Petit, 89 *Mich.,* 673.

The person who receives rents and profits of land from a trustee cannot release or convey. It follows that such an interest is inalienable.

§8847 Comp. Laws, 1897.

C.L. Mich. 1915 — 11553

Trusts authorized under subdivisions 1 and 2 of section 8839 never suspend alienation, while those under the remaining subdivisions may, particularly when they come within the prohibition of section 8847.

An annuity payable by a trustee from rents and profits of land was held to count as a life and to suspend alienation, in

Wilson vs. O'Dell, 58 *Mich.,* 533.
Dean vs. Mumford, 102 *Mich.,* 510.
Niles vs. Mason, 126 *Mich.,* 482.

Cole vs. Lee, 143 *Mich.,* 207, would seem opposed to the foregoing rule, but in this case the annuities were not charged upon rents and profits of land, but upon the body of the estate and properly come within subdivision 2 of the statute.

Failure of a remainder to vest in interest is illustrated in a specific devise of distinct parcels of land to three daughters with remainder over to the body heirs of all three daughters.

The will was held void as during the lives of the three daughters it could not be determined who would be their body heirs and there were no persons in being who could convey an absolute fee.

Trufant vs. Nunnelly, 106 *Mich.,* 554.

With these brief suggestions, I again refer you to Mr. Chaplin, calling your attention to Act 280, P. A., Mich., 1915, under which charitable and educational trusts are permitted in perpetuity.

We will devote a few words to the subject of the con-

tents of mortgages, leases and executory contracts of sale. Substantially the same rules as to form, manner of execution, interpretation that have been given apply to them.

MORTGAGES.

Mortgages were originally conveyances of land in fee, but upon condition that upon the payment of a certain sum of money and interest the grant would be void; that is, they were grants to be defeated upon performance of a condition stated in the deed.

They originally passed the legal title to the lands. The modern doctrine is that they merely create a lien upon lands. The forms of mortgages in common use follow the statutory form rather than the grant upon condition. I refer to the same statute which provides the statuory form of deeds.

Mortgages, in addition to the conditional grant of the premises or the statutory substitute, generally contain covenants:

1. To pay a certain sum of money with interest payable at fixed periods.
2. To pay all taxes assessed against the mortgaged lands.
3. To keep the improvements upon the land insured against loss or damage by fire for the benefit of the mortgagee.
4. Sometimes a covenant to pay an attorney fee in event of foreclosure.
5. An agreement that the the mortgagee may pay any tax or insurance premium not paid by

the mortgagor and for the repayment with interest thereon at the highest legal rate.

6. A provision that if default is made in payment of any installment of principal or interest tax or insurance premium the entire amount owing may be declared due.

7. A power of sale, which authorizes the mortgagee, in event of default, to sell the premises at public auction, to realize the amount due.

A note or bond is usually given in connection with the mortgage. This is the evidence of indebtedness and the mortgage collateral security for its payment.

Notes and bonds bear interest but "interest at six per cent per annum" is payable at the maturity of the debt unless the instrument fixes periodical payments.

A transfer of a note secured by mortgage carries the mortgage.

The clause for the payment of taxes is not necessary as the mortgagee would have the right to protect his security against such a claim and add the amount paid to the mortgage debt without such an agreement, but he could collect interest on his outlay only at the legal rate.

Sometimes a provision is added to the tax clause requiring the mortgagor to pay all taxes assessed against the mortgage interest. Such clauses are dangerous. If the tax with the interest exceeds the rate of interest legally permitted, the instrument will be usurious and all interest forfeited.

The insurance clause is important; without it the mortgagee would be compelled to insure at his own expense or take the risk of fire and look to the land alone.

The insertion of a provision for attorney or solicitor fees in event of foreclosure is useless, such undertakings being under the Michigan rules unenforcible penalties.

If the mortgage be foreclosed by exercise of the power of sale, the statute authorizes fixed attorney fees to be added.

§11152 Comp. Laws, 1897.
C.L. Mich. 1915 — 14968

If the mortgage be foreclosed in equity the attorney fee provided by the rules of court may be taxed. No other attorney fee can be recovered.

If the provision permitting the entire debt to be declared due is omitted, foreclosure can only be had for the amount actually due and the lands sold for this amount subject to the amount to become due.

The court is given a discretionary power to sell for sum not due by statute.

§528-531 Comp. Laws, 1897.
C.L. Mich 1915 — 12689-n - 12692n

Unless the mortgage contains a power of sale it can only be enforced by a foreclosure in equity. The power in the mortgage is the foundation of the foreclosure by advertisement.

LEASES.

Leases are grants for a term of years rather than in fee and resemble the old feudal tenure in that rental is reserved.

The ordinary lease contains:

1. The grant of the premises for a term of years.
2. A condition that entry may be made and the premises repossessed if any covenant is broken.
3. A covenant to pay a certain rental at a certain time or times.
4. Usually a covenant by the tenant not to assign or sublet.
5. A covenant by the tenant to keep the premises in repair.
6. A covenant to quiet enjoyment.
7. A covenant to use the premises for a particular purpose.

The ordinary forms specify the purpose for which the premises are leased but generally omit a covenant by the tenant to use the premises only for such a purpose.

It is safer to embody an express covenant of the tenant to use the premises only for a specific purpose, then the right of re-entry for a breach is beyond dispute.

The lease should contain a reservation to the landlord of the right to enter and inspect the condition of the premises and to make repairs if he deems the tenant negligent in his duties in this respect.

The landlord is as much a trespasser as a stranger should he enter the demised premises without the tenant's consent.

Leases of buildings for commercial or manufacturing purposes often contain and should contain various mandates and reservations. For instance provisions:

> Requiring the tenant to keep and obey all police and sanitary regulations imposed by any state or municipal authority.
>
> To observe all reasonable regulations imposed by any underwriter as a basis of the insurance rate upon the building.
>
> Not to permit any inflammable or combustible matter to accumulate upon the premises.
>
> A provision that the term shall end at the option of the landlord in event of insolvency of the tenant.

The landlord should never covenant in the lease to make repairs of any kind. Such a covenant will subject him to liability for damages to the tenant or others for a defective condition of the premises. There is no such liability unless there is such a covenant in the lease. A dangerous condition of the premises might exist for months without a landlord having any notice or knowledge of the situation.

There is no limitation upon a period or term of a lease except that contained in the constitution in case of agricultural lands, though a lease for years may offend the statutory provisions limiting the suspension of alienation.

> §8805 Comp. Laws, 1897.
> Art. XVI., Sec. 10, Constitution, 1907.

C. L. Mich. 1915 — 11541

MEMORANDUM OF SALE.

The preliminary instrument in the conveyance of a parcel of land is usually a memorandum of sale to make a valid contract under the terms of the statute of frauds.

The test of sufficiency of such instruments is, does the memorandum give the terms of the proposed sale sufficiently complete to enable a court to enforce the contract without resorting to other evidence?

It should acknowledge receipt of any part of the purchase money paid, describe the land, state the condition of the seller's interest, whether clear or encumbered, and if encumbered what disposition is to be made of the encumbrance; state the purchase price and the terms of payment of the price, if payment is deferred and to bear interest, the rate of interest and when payable; contain the seller's agreement to sell the land to the purchaser on the terms stated and to deliver a marketable title and fix the time for consummation of the contract. It usually provides for the delivery of and time for examination of the abstract. It should be signed by the owner of the land and his wife, if the title is joint or the land a homestead.

The purchaser's oral agreement to buy is a binding contract.

OPTIONS.

Instead of a preliminary memorandum of sale for the purposes of the statute of frauds, an option is sometimes made. This is a contract where the seller, for a consideration varying from the nominal consideration of a dollar to any sum, agrees with the purchaser to sell certain lands on certain terms to the purchaser at any time within a certain period. The seller is bound by the contract to sell, but the purchaser may complete the contract, or if he fails so to do within the time fixed, the contract is at an end. It is simply a right to purchase for a fixed time. This instrument should contain the substance of the memorandum of sale as to description, purchase price, terms of payment, condition of title as to being clear or encumbered, etc., and contain an agreement by the purchaser to sell the land to the purchaser or his assigns at any time on or before a fixed day rather than for a period of time. If it be a thirty-day option, fix the time a month in advance, as January 12 next, at 12 o'clock noon, and avoid computation of time.

It should provide that it may be exercised within the time fixed by an acceptance in writing accompanied by a deposit on account of the purchase price, and provision for delivery of abstract and time for consummation. The option must have a consideration. The money paid for the option should not in the terms of the option be applied upon the purchase price. If you take a thirty days' option at $50,000 and pay $1,000 for the option, pay your $1,000 and take the option for $49,000.

EXECUTORY CONTRACTS OF SALE,

or what are commonly termed land contracts, generally contain parts of the deed, mortgage, lease and memorandum, viz:

1. The agreement to sell certain described land by one party to another for a certain sum.
2. An agreement by the vendee to purchase the land and pay the purchase money at a certain time or certain times, with interest, payable at certain intervals.
3. A tax and insurance clause as in a mortgage.
4. An agreement by the vendor to deliver an abstract of title.
5. An agreement by the vendor to convey the land free from incumbrances on performance by the vendee.
6. They should contain an agreement permitting all sums owing to be declared due if default is made.
7. An agreement that the vendee shall have possession of the premises while he is not in default in carrying out the terms of this contract.
8. A provision for forfeiture and repossessing the premises.
9. The contract usually contains a provision prohibiting an assignment by the vendee of the contract or a sale of his interest in the land.

If the contract does not contain an agreement by the vendor to furnish an abstract he is under no obligation to do so.

What has been said in connection with deeds as to parties and description of lands will apply to mortgages, leases and contracts.

Unless the contract of sale by its terms gives the vendee the right of possession he has no such right.

Unless the contract gives the vendee the right of possession, the machinery of the statutes regulating summary proceedings to recover possession (§11164-11183, Comp. Laws) cannot be invoked to recover possession.

The statement in the contract of the nature of the rights of the vendee in default, whether a tenant at will or a tenant holding over without permission, determines the notice necessary to be given before a forfeiture can be enforced.

Murphy vs. Mc Intyre, 143 *Mich.,* 342.

It may be said that whenever the amount paid on account of the purchase price by the vendee substantially exceeds the fair rental value of the premises that the only safe method of extinguishing the vendee's right is what is generally termed a "foreclosure of the contract."

The proceeding for foreclosure is rather a proceeding in equity to enforce a vendor's lien.

Fitzhugh vs. Maxwell, 34 *Mich.,* 138.

The above decision contains a learned discussion of the rights of parties to an existing contract for the sale of land and should be read.

Be careful in attempting to enforce or forfeit such

contracts as were made during the time Act 200, Public Acts of Michigan, 1911, was in force. This act provided an exclusive remedy under certain contracts and incidentally gave the purchaser a right of redemption for one year. The act was repealed at the session of 1913.

Our courts have held that a right of redemption is a part of a contract and that it is not in the power of the legislature to destroy such right by repealing the act and changing the remedy.

Cargill vs. Powell, 1 *Mich.,* 369.

Upon the execution of a contract, the interest of the purchaser is real estate, while that of the seller is a security for purchase money. The legal title of the land remains in the vendor, but in trust as security for the purchase money. Upon the administration of estates, the interest of the vendor is personal property subject to distribution as such, while the interest of the vendee is real estate and descends as such.

The usual method of transferring the interest of a vendee is an assignment of the contract. The clause prohibiting an assignment by the vendee is of doubtful validity. Our court has never directly passed upon it. The New Jersey court has in effect held it invalid.

When we consider the rights of the parties in the property it seems to me that the proper method of transferring the vendee's interest is the usual warranty deed subject to the incumbrance for the purchase money with a covenant by the grantees to assume and pay the same. The vendor's own land, why not grant it by deed the same as if the land was subject to a mortgage?

I have met with objection to such a course, but the same person has invariably consented to the execution of an assignment containing all the elements of a full covenant warranty deed other than its form.

Suppose a contract was made in 1900 and assigned in 1914, and the assignee paid the balance of the purchase money in 1915. He would receive a deed with the covenants limited to 1900. If a tax or other incumbrance attached in 1913 through the omission of the original vendee, the purchaser would have no redress under the covenants in his deed. There are no covenants in the assignments in common use. He would have no redress.

The vendee is seized of an equitable title and it is not subject of dower. Dower at common law never attached to an equitable title.

Stephens vs. Leonard, 122 *Mich.,* 125.

The homestead right will attach to an equitable title.

THE PRACTICAL DRAFTING OF CONVEYANCES.

A few words upon the practical drafting of conveyances. The stationer supplies printed forms of nearly every conveyance in common use. There is no objection to their use, but in using them do not take for granted because the particular form is labeled deed, mortgage, contract, option, release, that by merely filling in the blank spaces with names, dates, descriptions, terms, that the result will be the desired conveyances.

Nearly all the forms of deeds of land are sufficient for a simple conveyance in fee simple by one person to another.

Scrutinize the mortgge blank and determine whether it contains the necessary covenants as to the payment of taxes, maintenance of insurance; whether it authorizes the mortgagee to declare the entire debt due if default is made in the payment of any installment of interest or other covenant. Does it contain a power of sale? Is the interest clause so framed that it is free from usury? Does it contain the provisions that are inserted in mortgages taken by financial institutions in the locality? If your client should desire to dispose of his security it will not increase his confidence in you if the banker refuses to purchase because of the form of security.

What are the remedies of the vendor under the particular blank form of a land contract which you purchase? When in default, is the vendee a tenant at will entitled to three months' notice or a tenant holding over without permission after his term has expired and entitled to reasonable notice of forfeiture? If he makes default must you enforce your contract for two or three monthly payments or does the form authorize the vendor to declare the entire amount owing due and payable?

Does the form of assignment of mortgage transfer the note or bond and the mortgage or only the mortgage?

The ordinary form of part release of mortgaged premises in the market was evidently prepared prior to 1840, when a mortgage was a conditional deed, and has never been revised. You can use it; it will effect a release of the desired land. It will indicate a better understanding of your calling to draft an instrument re-

leasing the particular land from the lien of the mortgage unless the mortgage is drawn upon an antique form which is still sold by the stationer.

The stationer's form of option when filled in and executed will give you a right to purchase a piece of land, but it will not give you any time to examine the title or even a right to demand an abstract of title for that purpose. Under it you simply pay your money and demand a deed.

You must read the form and determine that it contains the necessary provisions to carry out your design; the fact that it is in common use does not make it infallible.

Having procured a proper form and determined that the particular form will carry out your design, the most important act in the use of the form is to exercise the highest degree of care in writing the names of persons. There are no rules regulating the spelling of names of persons. When your instrument reaches the recording office to be copied there is nothing to distinguish "U" from "N" or an "F" from a "T," an "S" from an "R" or an "O" from an "A" except such care or carelessness as you have devoted to their production. The context will enable one to decipher other words, but upon the conveyancer alone rests the responsibility of certainty of names.

In drawing warranty deeds to be executed by a man and wife of land in which the wife only has a dower interest or as a tenant by entirety, there is nothing gained by the wife joining in the covenants for title.

She cannot be bound by her covenant in a deed unless it conveys her sole property.

The practice of ruling in all blank spaces in a deed with colored lines should be followed, but do it personally. Use your head as well as your hands. When you are about to rule out a space read enough of the instrument upon either side of the blank to determine its purpose and you will often fill the space with a word or phrase rather than a line.

Ruling out the blanks improves the appearance of the instrument and if performed thoughtfully it serves as a check upon the accuracy of the instrument and usually results in the crossing of "t's" and dotting of "i's" which would otherwise be left to conjecture.

When you underline the names of grantor and grantees, just imagine some other person wrote them and see if you can determine who they are.

In expressing the terms of your contract, endeavor to do so in simple, short words free from ambiguity and when once expressed, stop; do not repeat the statement in other language or attempt to state what you intend by the expression used. Repetition is productive of uncertainty. If you have so expressed yourself that it is necessary to detail your intention, rewrite your instrument in such language that another can deduce but one meaning from it and that the desired meaning. This is sometimes difficult, but usually possible.

Your client can better afford to pay for a little additional time for such an effort than to pay for litigation over the meaning of an ambiguous instrument.

Personally, I believe in the filling in of blank forms in long hand. The typewriter avoids illegibility, but the

ink of the ribbon has but little durability. In writing descriptions there is a common practice of writing out the lot number and repeating the number in figures. viz: "Lot seven (7)." I can see no benefit from the practice except an enlarged field for error. The writing would prima facie overrule the figures.

Use care in describing fractional parts of irregular lots. Halves and quarters are measures of area, not frontage. If you desire to convey half of an irregular shaped lot sometimes it can be accomplished by using the expression "half the width," but it may be necessary to describe its boundaries by their courses and distances.

EXAMINATION OF TITLES.

Title to land may be said to be the right of a private individual to the exclusive possession of a particular parcel of land as against the remainder of the world.

The original source of title is the sovereign power as the king was the original source of title under the feudal system. The original evidence was the mailed fist and the lance.

The early adventurers who discovered America took possession of the territory in the names of their respective sovereigns. Through wars and treaties the American colonies and ultimately the United States succeeded to the title to the country. Grants emanating from the sovereigns in power from time to time were made to private individuals.

Michigan lands are a part of what was known as the

Northwest Territory. Many of the original colonies claimed that their charters from the crown gave them title to land far to the westward of the present limits of the respective states, while the general government that existed under the Articles of Confederation claimed that the unsettled domain was spoils of the Revolutionary war for common division.

Virginia, Massachusetts and Connecticut claimed the Northwest Territory. Virginia ceded her rights to the general government in 1784. Massachusetts followed in 1785 and Connecticut in 1786, and the United States is regarded as the original source of title to lands in the states which were formed out of the territory, excepting the so-called Private Claims to which the United States never had any title whatsoever.

The United States has granted parts of the public domain to private individuals under cash, homestead and military bounty entries and to the state under the various university and school lands and swamp land grants, and as subsidies for public improvements such as canals, highways and railroads. Patents have been executed by the Federal Government and by State governments of the lands granted to them.

The recording laws have provided a place of public registration of conveyances, patents, grants and other evidence of title.

The system of indexing public records in common use in most of the states is an alphabetical index of the names of the grantors and grantees.

This has been found uncertain and private individuals

have undertaken to copy the public records and index them by reference to the land described in the instrument, and prepare and furnish brief abstracts of such of the records as affect the title to a specific parcel of land. This production is called an abstract of title and varies from a mere index of the records to a more or less complete copy of every instrument and judicial proceeding affecting the particular land.

In some localities the party making abstracts instead of supplying a copy of the record, himself employs competent talent and examines the records and furnishes a certificate of title. The purchaser relies upon this certificate rather than abstract and an attorney's opinion. Certificates are common in Cleveland, Chicago, Los Angeles and in the larger cities in the west, and are coming into use in this city.

The examination of land titles may be stated to be an examination of the public records for evidences which when produced in a court of justice will enable a person to assert or defend title to a piece of real estate.

As has been stated, the public records are presumptive evidence of the matters stated in the record.

Before taking up the subject of the record evidence, your attention should be called to the fact that title to land can exist without any record evidence whatever that will prevail over the best of record titles, viz:

1. Possession under claim of title for the period of the statute of limitations.
2. Possession under an unrecorded grant from the holder of the record title.

It follows that in the examination of title to land, as diligent an inquiry should be made into possessory rights as in the record title.

In the examination of an abstract of title your object is to determine in whom does the abstract show presumptive evidence of title and is the title shown by such evidence a marketable title?

Unless the contract contains a provision to the contrary a marketable title is all that the purchaser is entitled to receive.

The term marketable title does not mean a perfect title, but simply a title which is not subject to any fair or reasonable doubt.

Such a thing as absolute security in the purchase of real estate is unknown.

The record evidence is only presumptive, not conclusive, evidence of ownership.

There is no such a thing as mathematical certainty; the laws of average and common sense are the governing rules.

Assume that you have reached the conclusion that the submitted title is bad; apply the practical test.

Imagine yourself consulted by the person who holds the outstanding hostile interest. That he desires to enlist your services to recover the land. He submits the title, showing it vested in an ancestor or a kinsman. He shows that apparently, so far as the records go, this title has never been parted with.

He shows his relationship and that he is sole heir-at-law of the party holding the apparent title.

You advise him that his ancestor had title and still has the record title, you approve the evidence that he is sole heir-at-law. But when he wishes you to commence proceedings to recover the land, what is your reply? Invariably it is that you and those through whom you claim will have no standing before the court. You have neglected to claim your rights for so long a period of time and allowed others to remain in possession and make improvements for such a period of time that your claim is stale and your rights are barred by the statute of limitations.

Is it consistent to advise a purchaser that there is a reasonable doubt about a land title when you would advise the party entitled to bring the action to recover the land that there is no reasonable doubt but what his action will be unsuccessful?

An examiner of title is liable to an action of slander of title in the same manner as any other individual. It would doubtless be a difficult matter for the plaintiff to show the element of malice, but his showing of a possessory title is a sufficient showing for the foundation of the action so far as the element of falsity is concerned.

Hines vs. Lumpkin, 19 *Texas App.,* 556.

However, our court has rendered a decision to the effect that a purchaser is justified in refusing a title when *doubtful questions* of law are involved and the purchaser is advised by a reputable attorney acting in

good faith that the title is of doubtful validity.

Walker vs. Gillman, 127 *Mich.,* 269.

In every title there are some defects and some irregularities. It will not be for you to determine their legal effect. It is not a question of whether a particular deed has been prepared and executed as you think it should be executed or whether a particular legal proceeding has been conducted as you believe it should have been conducted, but the question is: Is the deed or proceeding sufficient for its purpose as a matter of law?

Suppose that you find that some transaction standing by itself which is absolutely void, a condition may exist which renders the title of the grantee in the last recorded deed a marketable title.

For example, suppose Jones owned a parcel of land and mortgaged the same to a bank, that the bank foreclosed the mortgage and a trust company purchased the title upon the foreclosure sale and the foreclosure proceedings were fatally defective, and later the trust company conveyed it to Jones, the original holder and mortgagor, and no rights of others intervene, the defective foreclosure could not affect the title.

The easiest known occupation is that of finding fault and criticising the acts of others, but remember when your client submits to you an abstract for examination he usually desires to purchase the land described. Your duty is to approve the title unless there is a reasonable doubt as to its validity and his security.

The money he pays you for examining his title is like that paid for fire insurance. Property does not have to

be fire proof to be an insurable risk. Nor does a land title have to be perfect to permit the land to be purchased with safety and enjoyed with security.

If the abstract shows a glaring defect of recent date and which affects an entire subdivision, the probabilities are that you are not the first one to make the discovery. Don't content yourself with the abstract, but go to the original evidence, be it legal proceedings or record, and verify the abstractor's copy and your defect may fade away.

Never declare a title bad until you have made an exhaustive effort to approve it.

Examine the original record of the defective conveyance or proceeding.

Endeavor to secure and examine the original instrument.

Assure yourself that the law, common or statutory, in force at the date of the transaction was the same as at the existing law as you understand it.

Always assume that the title ought to be good and if there is evidence that the debatable instrument or proceeding was the work of a lawyer, who was at that time of reputed ability, do not act too hastily in concluding that he was in error.

TITLE BY POSSESSION.

A title founded upon possession alone is a legally marketable title under the laws of Michigan.

Barnard vs. Brown, 112 *Mich.,* 452.

As a matter of practice possessory titles are not generally acceptable upon Griswold Street, though a court may compel the purchaser to accept them. In order to rely upon possession to make title it is necessary to go outside of the abstract and inform yourself that the statute has run.

The statute of limitations which is the foundation of a possessory title is found in §9714 to §9727, Comp. Laws, and provides the following periods, viz:

1. When the defendant claims title through a deed made upon a sale by an executor, administrator, guardian, sheriff or other ministerial officer under an order, judgment, decree or process of a court of this State or by a sheriff upon a mortgage foreclosure sale, any action is barred after five years.
2. Where defendant claims title through a deed made by some officer of this State or the United States upon a tax sale, action is barred after ten years.
3. In all other cases action is barred in fifteen years.

§9715 provides if the action accrued to the predecessor in title, the person who brings the action, the

period of the limitation shall be computed from the time the action first accruing to the predecessor.

§9716 fixes the time when actions first accru.

1. When a person is dispossessed the action accrues at that time.
2. When the party claims as heir or devisee the action accrues from the death of the ancestor unless a life estate intervenes, then it accrues upon termination of the life estate.
3. Where there is an intermediate estate or the party claims as remainderman or reversioner, then the action accrues from the time such intermediate estate terminates.
4. When the party claims for breach of condition or forfeiture the right accrues at the time of the breach or forfeiture.
5. In all other cases the right of action accrues at the time the claimant became entitled to possession.

§9718 to §9720 provide for certain abatements:

If at the time when any right of action shall *first accrue* the person entitled to bring the action shall be

1. A minor,
2. A married woman,
3. Insane,
4. Imprisoned,
5. Absent from the United States unless within one of the British provinces of North America,

Such *person* or *any one claiming under him* may bring such action at any time within five years after such disability shall have been removed.

§9719 provides that if the person first entitled to bring the action shall die during the disability without any determination or judgment having been rendered, his heirs or those claiming under him may bring an action within five years after his death.

§9720 provides that no abatement shall be had for the disability of any successor in interest.

You will observe that the abatement of the running of the statute only occurs when the person *first* entitled to bring the action is *under* one of the disabilities mentioned *when* the action *first accrued.*

You will observe that it is the person to whom the right of action *first accrues* and not his successor in title who is entitled to the abatement for disability.

TITLE BY RECORD.

Abstracts of title made in Wayne County are usually prepared to cover an entire subdivision and the earlier part is often printed. Title to parts of the subdivision may be derived through different sources. For example, a private claim may have been patented to one person and at his death or later divided into five lots numbered 1 to 5, and conveyed to different persons and the title again vested in one person and divided into a number of 30 foot lots. If you are examining the title to lot 200, for example, the first question to be determined is, is lot 200 a part of one or more of the original lots? If it is a part of original lot five you have no concern with the title to original lots one, two, three or four. No matter what defects there may be in the title to

those lots, lot 200 of the new subdivision cannot be affected. Or suppose a subdivision is made of a part of private claims 26 and 641; if your lot is in private claim 26 you have no concern with the title of private claim 641.

TITLE THROUGH CONVEYANCES.

Having determined what part of the land your title comes through, assuming the title comes from the original patentee, your inquiries are:

1. Does the similarity of names of the grantee in the one deed with the name of the grantor in the next raise the legal presumption of the identity?

2. If the grantor is a male, does a wife join in the execution or the deed recite that he is single?

The deed of a married man in which his wife does not join leaves her dower outstanding and if the land is a homestead the deed is void.

3. If the grantor is a female and the deed was made prior to the abolition of the estate by the courtesy, does the husband join or is there any evidence that the grantor was unmarried?

4. If the possibility of dower or courtesy is not thus eliminated, is there any other evidence of its non-existence?

The age of the instrument, in view of the expectancy of life, is to be always taken in account. If the deed was made prior to 1850 it can be assumed as axiomatic that dower or courtesy cannot exist.

The legal principles that the action of dower does not accrue until the death of the husband and does not survive the death of the wife, must be kept in mind.

5. Does the instrument contain the operative words essential to a grant?

6. If the grant was made prior to 1881, does the instrument contain words of limitation?

7. Is the grantee described apparently a person capable of taking title?

8. Does the deed describe the land with sufficient certainty to enable one to identify it?

9. Are there any recitals in the deed giving notice of the rights of others?

10. If the grant is a quitclaim was it delivered subsequent to the date of the acquisition of title by the grantor?

11. Is the instrument executed and acknowledged in the manner required by the law in force at the time of its execution or by some subsequent curative statute, so as to entitle it to be recorded?

So much for the record, but who knows whether the original instrument is genuine or forged or whether the grantor was insane and incompetent or whether the recitals as to marriage are true or false or the party signing as a wife was the legal wife, or whether the grantee named in the one deed is the same person as the grantor of identical name in the deed following? These questions must often be left to common honesty.

A deed from a stranger to the title raises no presumption of title unless the grantor was in possession.

Crawford vs. Corey, 99 *Mich.,* 415.

A deed from a stranger to the title is not a cloud which equity will remove.

In the examination of the records of a land title you are confined to the record of the title to the land in question and are not concerned with the title to other lands.

If you are examining the title to lot 7 of a particular subdivision and the title to lot 9 comes through other conveyances and in those instruments there is notice of an incumbrance upon lot 7, such record is not notice to the purchaser of lot 7. To use the technical expression, "It is not in the chain of title."

Albany Savings Bank vs. Brass, 59 *App. Div.,* 37 *N. Y.* (This case was affirmed by the Court of Appeals without an opinion, 88 *N. E.,* 1105.)

Meachem vs. Blaess, 141 *Mich.,* 260.

Even though you examine the title to lot 9 and know the contents of the conveyances, your knowledge will not bind your client. You are only an agent and such an act would be outside the scope of your authority.

Albany Sav. Bank vs. Brass, supra.

It is somewhat difficult to harmonize this rule with the rules followed in building restriction cases, but I believe the notice in such cases is the actual notice imparted by the buildings in the neighborhood rather than constructive notice of the record, where there is nothing in the chain of title showing a restriction.

If the deed purports to come from a surviving tenant by the entirety, there must be presumptive evidence of death of the other tenant, and if the death of one of the

tenants occurred since Sepember 1, 1909, there must be evidence that the marriage relation existed at death.

Act 259, Pub. Acts Mich., 1909.

Since the passage of that act divorce converts a tenancy by entirety into a tenancy in common unless the decree otherwise provides.

Conveyances under powers of attorney are prepared in the same manner as for execution by an owner.

The name of the owner is signed by the attorney. The attorney then adds the word "by," signs his name, and adds beneath the words, "his attorney in fact."

The acknowledgment of the attorney may follow the statutory uniform form, §9020 Comp. Laws, or simply recite the appearance of John Smith, attorney in fact for James Brown, and that he acknowledged the instrument as his free act and deed as such attorney in fact for and in behalf of said Brown.

In examining powers of attorney in connection with land titles you must observe:

1. That the date of execution antedates the instrument in question.
2. That the language confers power to perform the particular act.

The rules of law governing agency are to be applied.

3. That they are executed in a manner entitling them to be recorded.
4. If any great interval of time has elapsed between the date of execution of the power and date of the deed under it, inquiry must be made

whether any revocation has been made and recorded and whether the donor was still living. Death revokes the power unless coupled with an interest.

The statute provides how a married woman may release her dower, viz:

(a) By joining with her husband in a conveyance of the land.

(b) By joining with her husband in a subsequent deed or by a deed executed by the wife alone to one who has theretofore acquired and then holds the husband's title, provided the intent to bar her right of dower shall be expressed in said deed.

§8930 Comp. Laws, 1897.

TITLE THROUGH FORECLOSURE OF MORTGAGES.

The object of a foreclosure of a mortgage is to extinguish the equity of redemption in the mortgagee or his successors in title. There are two methods, by a proceeding in a court of equity and foreclosure by advertisement or more correctly termed a statutory foreclosure by exercise of the power of sale.

THE STATUTORY FORECLOSURE.

To make a valid statutory foreclosure:

(a) The mortgage must contain a power of sale.

(b) There must have been a default in some condition of the mortgage making the power of sale operative.

(c) No suit shall have been brought to recover the debt secured, or such suit must have been discontinued or an execution on a judgment returned unsatisfied in whole or in part.

(d) The mortgage and all assignments must have been recorded.

Assuming this condition to exist, the tests to be applied are:

1. Was notice that the mortgage would be foreclosed by sale of the mortgaged premises published for twelve successive weeks, once in each week in a newspaper printed in the county where the land or some part is situated?

2. Does the notice specify the names of the mortgagor, mortgagee, and assignee, if any?

3. Does the notice specify the date of the mortgage and when recorded?

4. Does the notice specify the amount claimed due at its date?

5. Does the notice specify a description of the mortgaged premises substantially the same as in the mortgage?

6. Was the sale made at the place of holding the Circuit Court, in a county where the mortgaged land or some part of it is situated?

7. Was the sale made at the time fixed in the notice by the person appointed in the mortgage, or the sheriff, under sheriff, or a deputy sheriff, and sold to the highest bidder?

8. If the sale was adjourned from the time

fixed in the notice, was notice of adjournment given by publishing in the same paper as the original notice once each week?

9. If the mortgaged premises consist of several distinct tracts or lots not occupied as one parcel were the lots sold in parcels?

(The statutory requirement that the premises be sold in parcels has been repeatedly held mandatory.)

10. If the land has been sold in parcels to others since the mortgage was given, was the land sold in the inverse order of alienation?

11. Has the time for redemption from the sale expired without redemption being made?

12. Was the purchaser disqualified from purchasing?

This proceeding is purely statutory, and unless the proceeding will bear inquiries suggested it will not pass title without the aid of the statute of limitations.

THE FORECLOSURE IN EQUITY.

This proceeding varies little from any ordinary chancery suit. Most irregularities not affecting jurisdiction are cured by the decree. The parties have had their day in court.

The tests to be applied to this proceeding are:

1. Was the suit commenced in the county where the land or a part of it is situated?

2. Have the mortgagors and all persons who have acquired any interest in the premises subsequent to the mortgage, whether an estate in or lien upon the same, been made parties to the suit?

3. Have the wives of such male defendants as had a legal estate of inheritance in the land been made parties to the suit?

4. Have the defendants been served with process in a legal manner?

5. If brought in by publication, was the order of publication founded upon a sufficient affidavit of non-residence? Was the order made without fatal delay after the date of the affidavit, and was the order served or published in the manner required by statute?

6. If parties have acquired estates in or liens upon the lands subsequent to filing the bill and before recording the commissioner's deed, was a proper notice *lis Pendens* duly recorded?

7. Does the bill correctly describe the premises?

8. Was the decree properly entered and enrolled before sale?

9. Was notice of sale published once in each week for six successive weeks before the time fixed for sale?

10. Was a copy of the notice posted in three public places in the city, village or township where the land is located for six weeks previous to the sale?

11. If the sale were adjourned for more than one week was notice of adjournment printed and posted?

12. Does the notice contain:

(a) The title of the cause?

(b) The names of the parties?

(c) The date of the decree pursuant to which the sale was made?

13. Were the lands sold in the manner directed by the decree?

14. Was the sale reported and confirmed?

15. Was the sale made within ten years after entry of the decree?

16. Was the purchaser disqualified from purchasing?

17. Has the time for redemption expired without the right being exercised?

What has been said of titles through foreclosure of mortgages will apply to title through foreclosure or the specific enforcement of land contracts, except that there is no right of redemption from such a sale.

There is another feature in such sales that should be called to your attention. If the vendor forecloses and a third person purchases at the sale, unless the wife of the vendor was a party to the suit her dower in the land will not be acquired through the master's deed.

TITLE THROUGH INHERITANCE.

The persons entitled to succeed to the title to land by descent are determined by the law in force at the death of the ancestor.

The first law of descent in Michigan was embodied in the Ordinance of 1787, which was in force from July 13, 1787, to January 31, 1809, though not in full force in Michigan until July, 1796, when the British government evacuated Detroit.

July 1, 1796, has been fixed as the official date of the transfer of possession by the British to the Americans,

though I believe July 11, 1796, was the date the British flag was actually lowered.

See *Abbott vs. Godfrey's Heirs,* 1 *Mich.,* 182. *Farmer's History of Detroit,* 267 *et seq.*

The succeeding laws will be found:

Vol. 2, Territorial Laws, page 20. A re-enactment of the Ordinance. In force Jan. 31, 1808, to Jan. 19, 1811.

Vol. 1, Territorial Laws, page 160. In force Jan. 19, 1811, to Oct. 1, 1818.

Vol. 1, Territorial Laws, page 356. In force Oct. 1, 1818, to April 12, 1827.

Vol. 2, Territorial Laws, page 533. In force April 12, 1827, to Aug. 31, 1838.

Revised Statutes, 1838. In force Aug. 31, 1838, to March 1, 1847.

Revised Statutes, 1846, page 267. In force March 1, 1847, to Sept. 10, 1881.

Public Acts, 1881, page 29. In force Sept. 10, 1881,to Sept. 8, 1883.

Public Acts, 1883, page 180. In force Sept. 8, 1883, to Oct. 2, 1889.

Public Acts, 1889, page 193. In force Oct. 2, 1889, to Aug. 28, 1893.

Public Acts, 1893, page 322. In force Aug. 28, 1893, to Sept. 1, 1909.

Public Acts, 1909, page 663. In force since Sept. 1, 1909.

The statutory law is the only law governing descent. The common law rules have never obtained in Michigan.

Keeler vs. Dawson, 73 *Mich.,* 603.

The law of descent applies only to intestate lands.

Illegitimates inherit from the mother and the mother and her kin are the heirs of an illegitimate dying without issue.

§9065-9066 Comp. Laws, 1897.
C. L. Mich '15 — 11796 — 11797

The degrees of kindred are computed according to the rules of the civil law.

§9068 Comp. Laws, 1897.
C. L. Mich 15-11799

Half bloods inherit equally with those of the whole blood.

Where there are several collateral kin of the same degree, if the property was acquired by descent, devise or gift from an ancestor, those not of the blood of the ancestor are excluded.

§9065 Comp. Laws, 1897.
C. L. Mich 15 11796

The doctrine that an adopted child is the heir of the foster parent or parents and can inherit from them but not through them, that is, it can not claim the share of a deceased foster parent in land to which the parent would have succeeded if living, is laid down in

Van Derlyn vs. Mack, 137 *Mich.,* 146.

It was held that an adopted child would satisfy the classification of an heir in a remainder, in

Ultz vs. Upham, 177 *Mich.,* 351.

Without reference to *Van Derlyn vs. Mack*, the court seems to have overruled the doctrine therein laid down, in

Fisher vs. Gardner, 21 *D. L. N.*, 1236.

The land of an adopted child dying without issue which comes from or through the foster parents, will descend to their kin and not to its natural heirs.

§9077 Comp. Laws, 1897.

C.L. Mich '15 — 11808

Adoption is statutory and was unknown to the common law.

Albring vs. Ward, 137 *Mich.*, 342, 354.
Morrission vs. Session Estate, 70 *Mich.*, 297.

The first adoption act in Michigan was Act 26, 1861, which was repealed in 1887. The original act was held unconstitutional.

People vs. Congdon, 77 *Mich.*, 351.

The result is that adoptions made prior to the Acts of 1887, Nos. 171, 144 and 170, are void and inheritance can not be claimed by the foster child.

A husband and wife living in a bigamous relation at the time of the death of the lawful spouse, cannot inherit from him or her or claim dower.

Act 327, P. A. M., 1905.

Where a man dies without issue occupying a homestead, our courts have held that the widow is entitled to the homestead right as against brothers and sisters under the constitution.

Koster vs. Gellen, 124 *Mich.*, 150.

Title to land of a deceased person vests in the heirs or devisees at death, subject to the claims of creditors.

At common law lands were not assets in the hands of the administrator.

Shelden vs. Rice, 30 *Mich.,* 302.

In the examination of land titles, where title is derived by inheritance, we look to the record and proceedings in the Probate Court for evidence as to who were a deceased person's heirs and whether the claims of creditors have been extinguished.

Formerly the statute of limitations against the claims against a deceased person abates from the date of death until administration is granted.

§9737 Comp. Laws.

c.l. Mich. 1915 — 12328

Since August 23, 1915, claims against a deceased person are barred ten years after his death whether the estate is administered or not and those against persons deceased more than ten years prior to August 23, 1915, may be enforced on or before February 23, 1916.

Act 256, Pub. Act, 1915.

If the estate be intestate the inquiries are:

1. Was the petition for the appointment of an administrator filed by a person authorized by statute to set the administration in motion?
2. Was notice of the hearing given as required by statute?
3. Have Commissioners on Claims been appointed, met and reported their doings to the court after notice as required by statute?

4. If any claims, have they and the expenses of administering the estate been paid?

5. Has a determination of heirs been made? This is, under the statute, only prima facie evidence of the facts determined.

6. Has an order been entered assigning the residue to the persons entitled and the administrator discharged?

7. If the land was subject to an inheritance tax, has the tax been determined and paid?

Whether the order assigning the residue is a judgment in rem, conclusive upon all the world, if made after proper notice even though erroneous, has never been expressly decided in Michigan.

My personal opinion is that it is only presumptive or prima facie evidence of pedigree and is not conclusive upon a person not named and who had no actual notice. If this position is incorrect an erroneous order is binding.

In the older estates the only evidence of pedigree is often the recitals in the petition for administration. Such recitals as ancient documents are undoubtedly presumptive evidence.

Affidavits as to birth, marriage, death, name, residence, identity and relationship of persons named in conveyances may now be recorded and received as prima facie evidence in courts of justice under a recent statute.

Act 123, Pub. Acts Mich., 1915.

If the estate is testate the principal inquiries are:

1. Has the will been admitted to probate after statutory notice?

No petition is necessary to set the court in motion. If the will is deposited in the probate office it is the duty of the judge to give notice of a time and place of proving it.

§9278 Comp. Laws, 1897.

2. The rights of creditors are the same as in an intestate estate.

3. Did the testator leave any children who were born after the date of the execution of the will?

4. If so, does the will make any provision for them or expressly exclude them?

Children born after making of a will take the same share as if the parent died intestate, unless provision is made for them or they are excluded.

§9285 Comp. Laws, 1897.

5. If title comes through a devise, was the devisee a witness to the will? If so, were there two additional competent witnesses?

A devisee to the subscribing witness is void unless there are two other competent witnesses.

§9268 Comp. Laws, 1897.

6. The language of the devise must be examined to determine what estate is granted.

7. If a trust is created or conditions imposed, do they violate the rules against suspension of alienation?

Trusts are usually coupled with a power of sale and if the trust is void the power is void, and the purchaser derives no title. The land vests in the residuary devisee or in the heirs at law as intestate property.

Since the passage of Act 253 of 1899 a trustee must qualify before he can exercise the powers given him.

Gibary vs. Allen, 156 *Mich.,* 301.

As I have stated, Uses and Trusts and Powers, as they were known to the common law, are abolished in Michigan and a statutory code substituted.

Chapters 238 and 239.

§8829 to §8917 Comp. Laws, 1897.

All uses and trusts which existed prior to the revision of the statutes in 1846 which are not authorized by the provision of Chapter 238, were converted into legal estates in the beneficiaries.

§8829-8830 Comp. Laws, 1897.

Passive or naked trusts are abolished and the legal title vests in the person entitled to the rents and profits.

§8831-8833 Comp Laws, 1897.

Under this rule a grant to "A" in trust for the use and benefit of "B" vests title in "B." "A" takes no estate or interest, legal or equitable. A conveyance from "B" alone will pass title and a conveyance from "A" will pass nothing.

La Grange vs. L'Amoureaux, 1. *Barb Ch.,* 16.

If the party named as trustee in such a conveyance has any beneficial interest, the trustee not the beneficiary takes the legal title.

King vs. Townsend, 36 *N. E.,* 513.

A conveyance by a person whose only interest is the rents and profits of land under a trust, is void, unless the trust be to pay one gross sum, not several sums.

§8847 Comp. Laws, 1897.

The purchase from a trustee is not responsible for the proper application of the funds.

§8850 Comp. Laws, 1897.

When the purpose for which a trust is created has ceased, the estate of the trustee terminates.

§8851 Comp. Laws, 1897.

The last two propositions apply with like effect to powers.

§8885 Comp. Laws, 1897.

The effect of these rules may be illustrated by a devise to an executor in trust or a power to an executor to sell lands of a decedent to pay debts or to pay incumbrances. When the debts or incumbrances are paid, the power of sale in the trustee or executor terminates. Thereafter his deed will not pass title.

Powers and trusts are distinguishable in that a trust requires title of the property affected in the trustee while a power requires not title whatever.

A charge of debts or legacies upon land does not of itself confer any power to sell the lands to satisfy the charge. Such a claim is in the nature of an incumbrance.

A power may be created by express terms or by im-

plication or sometimes a void trust is valid as a power under the statute.

A power can only be exercised by a person capable of holding and alienating lands.

§8822 Comp. Laws, 1897. C. L. Mich. 1915, 11558

Where a power is vested in several persons, all must unite in its execution.

§8844 Comp. Laws, 1897. C. L. Mich 1915 11580

In case of the death of one of the donees the survivor may act.

Supra.

When the consent of a third person to the execution of the power is required, the consent shall be expressed in the instrument by which the power is executed or certified upon the instrument and the instrument or certificate executed by such person.

§8904 Comp. Laws, 1897. C. L. Mich, 1915 11640

It is not necessary to recite a power in a conveyance. If a conveyance is made and the grantor had no title but did have a power of sale, the instrument is ordinarily an execution of the power and will pass title.

§8906 Comp. Laws, 1897. C. L. Mich. 1915, 116

What has been said of powers does not apply to powers of attorney. The rules of agency govern such instruments as to their construction, and the rules of conveyancing govern their execution.

TITLE THROUGH PROBATE SALES.

Since 1809 statutory provisions have existed authorizing administrators and executors to sell land for the payment of debts where the personal estate is insufficient.

Sales may now be made:

1. To pay debts.
2. To pay legacies charged upon lands.
3. For distribution.
4. For preservation or to prevent sacrifice or when for the best interest of all interested or to carry out the provision of a will.

Sales for the purposes named in the fourth subdivision excepting that to carry out the provisions in a will was first authorized by Act 121, P. A. 1897.

This act was declared unconstitutional in *Bresler vs. Delray Real Estate, etc., Assoc.,* 156 *Mich.,* 3.

Guardians of minors, insane persons, and spendthrifts are authorized to sell the land of their wards when the personal estate is insufficient:

1. To pay debts.
2. To pay the expenses incurred by the state or any county for care and maintenance.
3. When income is insufficient to maintain the ward and his family or to educate him if a minor or his children.
4. When the court is satisfied that sale will be best for his best interest.

Assuming that a guardian or administrator or executor has been legally appointed, the tests to be applied to such sales are:

1. Was a license granted by a court having jurisdiction?
2. If a bond was required, was it given and approved by the Judge of Probate.
3. Was the oath before sale taken?
4. Was notice of sale posted in three public places in the ward or town where the land is situated six weeks previous to the day of sale, and notice published once a week for six weeks previous to sale?
5. Were the premises sold within one year after the license was granted and the sale confirmed?

If the facts suggested exist the sale will be sustained.

If the license is granted by the Probate Court of the proper county it will be sufficient.

Howard vs. Moor, 2 *Mich.,* 233-4.

Failure to verify the petition for license will not affect the validity.

Nor failure to properly publish the order for hearing.

Wood vs. Monroe, 17 *Mich.,* 238.

A sale by a de facto administrator has been sustained.

Supra.

TITLE THROUGH CHANCERY SALES.

The Chancery Court is authorized to appoint a special guardian to sell the interest of an infant, idiot, lunatic or other incompetent person.

Under this section application is made by the general guardian or if none, by the next friend of the incompetent, to the court in the county where the incompetent resides if a resident of the state and county where the land lies, if a non-resident of the state. This requirement is jurisdictional.

The special guardian must give a bond not only to account and pay over the proceeds but also for the faithful performance of his trust.

§536 Comp. Laws, 1897.
C. L. Mich, 1915 — 12497 m

The bond is jurisdictional and the court has no power to waive it.

Blanchard vs. Blau, N. Y. Sup., 418.

The court has no power to order a sale in contravention of the terms of will through which the incompetent derives title.

§541 Comp. Laws, 1897.
C. L. Mich. 1915 — 12702 m

Prior to the amendment of 1883 the statute applied to infants only and did not include insane and other incompetent persons.

It is doubtful whether under this statute the interest of a spendthrift can be sold.

The adjudication that he is a spendthrift only determines that he is unfit to have the care and management of his property.

Rice vs. Rice, 50 *Mich.,* 448.

The fact that one is adjudicated a spendthrift does not affect his competency to make a will.

Supra.

TITLE THROUGH EXECUTION SALES.

The points of inquiry where title is derived through execution sale are:

1. Was a judgment or decree legally rendered by a court having jurisdiction of the subject matter and of the person of an owner or part owner of the land?
2. Was a levy legally made and notice filed in the Register's office describing the land?
3. Was notice of sale describing the land posted in the township or city where the lands were sold six weeks previous to the sale, and if the sale were made in a different town or city than the place where the land is situated, was like notice posted in the same manner in the township where the lands are situated?
4. Was such notice published once each week for six weeks previous to the sale in a newspaper printed in the county?
5. Was the sale made at the Court House in the county where the land was situated between 9 a. m. and sunset?

6. Was the land sold in parcels in the order directed by the defendants?

7. Was the purchaser disqualified from purchasing?

8. Was a certificate of sale recorded within ten days after sale?

9. Was the sale made within ten years after entry of judgment or decree?

10. Was the sale made within five years after making the levy?

11. Has the time for redemption expired without being exercised?

12. Was a deed made and within ten years after the expiration of redemption?

The failure of the sheriff to give notice of the sale in the statutory manner suggested will not invalidate the title of a purchaser in good faith.

§9173 Comp. Laws, 1897.

c.f. Mich, 1915 1209 N

Since September 28th, 1889, under §9224 Comp. Laws, a levy is superior to the rights of prior grantee or mortgagee whose instruments are not recorded prior to the filing of the notice of levy in the Register's office.

Actual notice afforded by possession will protect such an owner or lienor against the operation of this statute.

DOWER.

It must be remembered that no execution, probate or other judicial sale of the husband's interest in real estate will affect the wife's dower.

Dower can only be released in the manner provided by the statute. It cannot be transferred to a third person while inchoate.

Gailbraith vs. Fleming, 60 *Mich.,* 408.

Under the statute and case cited it would seem to be the rule of law that speculation in an estate in dower is prohibited and that the estate is inalienable except to one who holds the fee title until after the death of the husband and the assignment of the interest to a specific parcel of land.

TITLE BY PARTITION.

Under the Michigan laws the Probate Court and the Chancery Courts are given jurisdiction over partition.

Voluntary partitions between common owners have always been recognized in Michigan, New York and Wisconsin.

Michigan has sustained a voluntary partition as against an incompetent person when consented to by his guardian.

Hunt vs. Rabitoay, 125 *Mich.,* 137.

In some states a voluntary partition is held void under the statute of frauds; such is the rule in Illinois.

But in that state where common owners have each conveyed specific parcels of the common land to others, the court has, when the transaction is followed by a considerable lapse of time, presumed a lost writing.

Marke vs. Wakeman, 107 *Ill.,* 251.

Recitals in ancient deeds have been held sufficient evidence of a voluntary partition where followed by possession.

Hunt vs. Rabitoay, supra.

The most conclusive authority for the rule that where the tenants in common have conveyed specific parcels of the common land in severalty, the deeds are evidence of a voluntary partition, is

Eaton vs. Talmage, 24 *Wis.,* 217.

This was an ejectment suit and only a legal title can be shown in such a cause.

The court lays down the rule:

> "Where there are two tenants in common, each owning an undivided half of land, neither can make a partition that will be binding on the other by assuming to convey either half specifically. But if one does so convey the other would be at liberty to acquiesce and accept the remaining half, and if he should do so by conveying that specifically, the two conveyances would operate as a complete and binding partition."

This decision seems to be founded upon good sense and the principle will often be involved in the old French titles in this locality, particularly up the shore of Lake St. Clair and in Macomb and St. Clair counties.

PROBATE PARTITIONS.

When title comes through a probate partition the inquiries are:

1. Has the court made an order assigning the residue?

2. Has notice been given in the manner directed by the court?

3. Have guardians been appointed for all minors or incompetents and agents for all heirs, non-residents of the state?

4. Has notice been given to all interested by the commissioners of the time and place the partition is to be made?

5. Have the commissioners filed their report and has it been confirmed?

PARTITION IN THE CHANCERY COURT.

This proceeding is purely statutory and governed by Chap. 304, Comp. Laws, 1897. C.L. Mich '15-1230 Sec

It can only be maintained by a person who has an estate in possession.

The bill must be verified.

General guardians represent their wards.

Every person having an interest in the premises, whether in possession or otherwise, and every person entitled to dower should be parties, also mortgagees and other lienors.

The proceedings to bring in a non-resident or unknown party differs from the ordinary chancery practice. The order for appearance is a three months' order and the order must contain a description of the land.

§11023 Comp. Laws, 1897.

C.L. Mich '1915-13268 Sec

The commissioners appointed must give notice of their meeting to the parties interested.

Simpson vs. Simpson, 59 *Mich.,* 71.

All the commissioners must meet together but the act of a majority will be valid and binding.

Jurisdiction of the person by service of process or service or publication of a proper order and notice by the commissioners are undoubtedly essential to a valid partition.

Dower is not affected unless the wife is made a party.

Griener vs. Klein, 28 *Mich.,* 12.

Most partitions are brought because of the incapacity of a minor or insane tenant to consent to an amicable division. Suit in such a case is unnecessary. The general guardian of a minor or insane person can petition the court exparte for leave to agree to the partition and with the approval of the court convey his ward's interest in return for a conveyance to his ward of a proper portion of the common premises by the other tenants.

§11 84, 11087, 11088, 11090 Comp. Laws, 1897.

Mich. 1915 — 13326 n - 13329 n - 13330 n - 13331 n

The inquiries I have suggested are only to guide you in recent transactions.

A title might involve every principle I have pointed out and fail under each of the suggested tests when applied, and because of adverse possession be unassailable and legally marketable.

Either examiners of titles must pronounce that title marketable which cannot be successfully assailed in the courts, or the abstract and the lawyer must be eliminated in the transfer of lands and a substitute found that will not be an obstruction to business.

I have suggested some of the leading principles of the subject of conveyancing and attempted to illustrate their practical application in the examination of land titles. With this introduction to the subject I wish to say in conclusion:

In the practice of conveyancing, parties with hostile interests will seek your service in the same transaction. Often one is a client and the other a stranger without other counsel. Under such circumstances your position is not that of a partisan. The ethics of your profession require, and common honesty demands that you act with absolute impartiality and guard the interests of the stranger with the same zeal that you look after the rights of your client. Do for the stranger what you would do for your client were their positions reversed. There is no other course; there is no excuse for any other or different action.

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